



EU Competition Policy Revisited: Economic Doctrines Within European Political Work

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**La politique européenne de la concurrence revisitée:
les doctrines économiques dans le travail politique européen**

Résumé

La politique de la concurrence européenne est souvent décrite comme néolibérale sans véritable investigation. Cet article explique comment la doctrine de la politique de la concurrence européenne a été construite, et comment le mouvement ordolibéral et les idées de l'école de Chicago ont été implémentés et soutenus par le travail politique d'un certain nombre d'acteurs clés. Nous montrons que contrairement à ce qui est parfois dit dans la littérature, les acteurs ordolibéraux n'étaient ni leaders ni hégémoniques pendant la période qui va des négociations du Traité de Rome au début des années 1980, même si un certain nombre de principes néolibéraux furent introduits dans le droit de la concurrence. Ces règles apparaissent plus comme un compromis entre représentants français et allemands, et entre des positions néo-mercantilistes d'un côté et ordolibérales de l'autre. Cependant, les choses changèrent fortement à partir des années 1980, quand, en même temps, (1) un travail politique des membres de la Commission pour compléter le marché intérieur est relancé et (2) des décisions de la CJCE clarifièrent la doctrine du droit de la concurrence européen. Désormais, la politique de la concurrence européenne apparaît comme un mélange entre un esprit ordolibéral et des éléments doctrinaires issus de l'école de Chicago.

Mots-clés : politique, concurrence, Union Européenne, néolibéralisme, ordolibéralisme, travail politique.

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Abstract

European Union competition policy is often described as neoliberal, without this leading to more investigation. This paper highlights how the European Competition policy doctrine has been shaped, how the ordoliberal movement and the Chicago school ideas have been implemented and supported by the political work of some key actors. We show that, contrary to what is sometimes said in literature, ordoliberal actors were neither hegemonic nor leaders between Rome Treaty and the eighties, even if some neoliberal principles were introduced in antitrust law. These laws are much more a compromise between French and German representatives, and between neo-mercantilists and ordoliberals. However, things have dramatically changed since the eighties, when both (1) new political work from members of the Commission introduced in the European competition policy elements of Chicago School doctrine to complete the European market and (2) some decisions from the ECJ clarified the doctrine of EU Competition law. Nowadays, European competition policy is a mix between an ordoliberal spirit and some Chicago School doctrinal elements.

Keywords: competition, policy, European Union, neoliberalism, ordoliberalism, political work

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<p>http://ideas.repec.org/p/grt/wpegrt/2011-33.html.</p>

Introduction

The European Union's (EU) competition policy is clearly trans-industry because it applies horizontally to all the domains of economic activity within this territory. Moreover, as existing research underlines (Wilks, 2005), a great deal of inter-firm competition in Europe has come to be governed at the scale of the EU. Indeed, this form of trans-industry regulation has constituted a central instrument in the institutionalization and the regulation of a single European market (Wigger, 2007).

However, what is much less clear is the role played by economic doctrines in this highly important political process. Many accounts of EU competition policy by political scientists concentrate upon the publicized clashes between 'neo-liberal' and 'neo-mercantilist' protagonists that have occurred during the history of the EU (Cini and McGowan, 2009). Some historians meanwhile have underlined how 'German ordoliberals' were largely successful in transposing the principles of a 'social market economy' upon the European Communities in the 1950s and, in so doing, defeating the 'planning' variant of neo-mercantilism from interventionist France, Italy and Belgium (Gerber, 1998). Others, however, dispute this thesis strongly by arguing that ordoliberalist influence on EU competition law and policy is overstated (Ramirez Perez, 2007).

Notwithstanding the quantity and quality of all this research, unfortunately much uncertainty and even confusion still remains over the precise ideological content of the economic doctrines used to build, legitimate and implement the EU's competition policy throughout the whole of its history. Indeed, especially when analyzing developments since the mid 1980s, academic analysis has rarely attempted to fully unpack the doctrines concerned¹. Moreover, much of this literature shares two problematical traits.

First, authors have either neglected the politics of competition policy norms and rulings that occurs around the substance of competition policy, or reduced this politics to the formal intervention of politicians². As we have underlined elsewhere, when studying economies it is more heuristic to define politics instead as *'behaviour that is both discursive and interactive which seeks to change or reproduce institutions by mobilizing values'* (Jullien & Smith, 2011: 15).

Second, and especially more recently, specialists of EU competition policy have frequently reduced explanation on change policy substance to 'a rise in the use of economic analysis' during decision-making (Wilks, 2007; Cini & McGowan, 2009). In so doing, however, precise knowledge has not been produced about what doctrines from economics this 'rise' has contained.

Overall then, a black box still remains around the processes of 'political work' through which economic doctrines have been translated over the six decades of EU competition policy's history into

¹ Indeed, there is a contrast here with work on the development of US competition policy which emphasizes both the role of economic doctrine and representatives of firms (Fligstein, 1990 & 2001).

² For a typical example of this use of the term politics see Damro & Guay who reduce it to the intervention of politicians in debates over competition policy (2009: 2). For a critique of this trend see (Bush-Hansen & Wigger, 2009: 3 & 6-7).

the institutionalized policy instruments of today's EU government of inter-firm competition. Through defining political work as a process that entails both the construction of industrial issues as 'public problems' (*problematization*) and their legitimation through politicization or depoliticization, this concept guides empirical research to produce knowledge on the argumentation and alliance-building activity of the actors concerned (Jullien & Smith, 2008: chapter 1). Analyzing political work in this way thus provides a means of understanding the production of the 'instruments' (Lascoumes & Le Galès, 2007) of the EU's government of interfirm competition and, thereby, the 'governmentality' (Foucault, 2004) it reflects and encapsulates.

More specifically, written by an economist, a historian and a political scientist and using initial findings from their ongoing interdisciplinary research³, in this paper the concept of political work will be used to shed light upon the relationship between economic theory and doctrine on the one hand and EU competition policy on the other. This goal is sought by developing and defending the following claim: the key debates over this policy have not only been the much publicized ones between neo-mercantilists and neo-liberals (Kariagiannis, 2009). Rather since the beginnings of the EU a crucial debate over competition policy has been located within neo-liberalism itself. More precisely, 'ordo-liberalism' – a theory often mentioned but rarely analyzed – needs to be seen both as a theory of, and a doctrine for orienting, economic activity which is best understood as a distinctive strand of neo-liberal thought.

The first part of this paper develops and explains this claim whilst highlighting its consequences for studying the government of inter-firm competition in general. Three empirical illustrations of our argument then follow, each of which retraces key episodes from the institutionalization of the EU's government of inter-firm competition.

Through re-examining the establishment of EC competition law between 1950-62, part 2 of the then paper underlines the impact of an initial cleavage between ordo-liberals and neo-mercantilists in the negotiations of the ECSC and EEC Treaties. In contrast to standard accounts of this founding period which claim an initial 'victory' for German ordo-liberals (Seidel, 2009); Quack & Djelic, 2005), we argue that the historical evidence points to a more complex and interesting relationship between economic doctrines and European-wide political work. Indeed, our analysis of the effects of this interplay seeks instead not only to better explain the actual content of the general articles and regulations on competition adopted at this time, but also, and more fundamentally still, to grasp the causality behind the limited impact of policy towards cartels and monopolies developed by the European Communities during the subsequent period that extended until the mid 1980s.

As is well known, the EU's competition policy came to be fully activated in the late 1980s and early 1990s. Here, however, the role played by economic doctrines has again tended to be treated in over-general terms – this time by invoking a 'neo-liberal victory' over neo-mercantilism (Cini & McGowan, 2009). In part 3 of this paper, we begin to set out a programme for research which argues instead for better analysis of the interaction between economic doctrine and European-wide political work that occurred during this period. More specifically, we defend a research perspective that better encompasses the arrival in pre-existing debates of a 'new' set of neo-liberals driven by the economic doctrines of 'the Chicago school'.

Finally, in order to bring this analysis up to the present day, social science needs to produce knowledge about how and why the EU's competition policy has been reinstitutionalized since the turn of the century (part 4). Here it will be argued not only that the importance of neo-mercantilism

³ This paper is based partly on previous empirical investigations (Ramírez-Pérez, 2007; Joana & Smith, 2002; Smith, 2009). But it is also heavily informed by new work currently being carried out within a research project 'Le gouvernement européen des industries' (GEDI). The latter is funded by the French *Agence Nationale de la Recherche* (ANR). <http://www.gedi.sciencespobordeaux.fr>

doctrine has steadily continued to decline. Instead, we go further in hypothesizing that the cause of change since 2000 is to be found in 1) a doctrinal victory by partisans of the Chicago approach to competition over ordoliberal thinkers and actors and 2) the translation of this victory into new instruments of EU governmentality.

Overall, through highlighting the role played by struggles over economic doctrine, and thus *within* political work, during each of these periods, our aim is to reproblematicize analysis of the institutionalization of the EU's government of competition with a view to launching new research in this subject area and, thereby, producing wider and deeper knowledge about its politics.

1. Studying the role of economic theory and doctrine within EU competition policy

The EU's competition policy of today is of course the cumulative result of a long process of compromise between actors claiming to represent interests of varying types. However, throughout these processes of interest interpretation and defence, inspiration has also been taken from theories and doctrines taken from the science of economics. Indeed, these doctrines have shaped the specific instruments of 'governmentality' (Foucault, 2004) which, in turn, have structured the practices of the EU's policy in this area.

Every economic policy, including that of competition, is generally founded upon one or several economic doctrines which themselves stem from economic theories. An economic theory is an abstract and simplified representation of how the economy functions that is structured around a set of hypotheses. Economic theory can take the form of economic models which are a specific formalisation of the theory that is based upon the exogenous and endogenous variables and parameters contained in the model. Economic theory's principal aim is heuristic in that it seeks to understand how an economy functions. In contrast, the aim of economic doctrines is normative because they seek to promote or favour a situation that is considered optimal from the point of view of social welfare, efficiency and/or social justice. Most often founded upon an economic theory, an economic doctrine is thus a rationality, but also a set of practices and rules designed to shape public intervention and economic policies.

The strong ideological content of such doctrines and the objectives they seek to attain in the economy, and through competition policy in particular, takes its first effect by shaping the government of inter-firm competition as a 'public problem' and guiding the design of policy instruments (laws, norms). Economic theory and doctrine also, and often simultaneously, can act as a means of legitimating the construction of problems and instruments. This takes place through their inscription within the two dimensions of what we call 'political work': the building of arguments and of actor-alliances (Jullien and Smith, 2008).

Competition policies are thus heavily structured by economic doctrines. However, like all economic policies, they are also the cumulative result of compromises between interests held by actors that are often in conflict or contradiction. Compromise-making frequently has the effect of creating a gap between policy and the doctrines and theories used during their formulation. Indeed, and for precisely this reason, today's competition policy of the EU is the product of both neo-mercantilist and neo-liberal economic doctrines. In order to show the consequences of this perspective for research, this section first sets out the general objectives and interventions of competition policy before proceeding to unpack how different economic theories have given rise to conflicting doctrines in this field.

1.1. The general aims and instruments of competition policy

Any competition policy shares the following general objectives:

- ensuring that the rules that govern the relationship between economic competitors are fair and equal;
- protecting the consumer;
- protecting the economic freedom of collective actors and individuals (firms and consumers);
- encouraging economic efficiency.

However, the hierarchy established between these objectives is the result of the doctrines mobilized and the negotiations that have taken place within the polity in question, as well as the rules that have progressively been institutionalized during this process. In particular, the extent to which the criteria of 'economic efficiency' has structured these rules correlates to the extent to which certain economic theories are explicitly referred to by competition authorities during decision-making.

The instruments of any competition policy essentially seek to control:

- monopolies and the abuse of dominant positions;
- cartels and other forms of inter-firm collusion;
- vertical restrictions and discriminatory practices.

As for the implementation of any competition policy, it can take several forms which vary around three variables. The first concerns the eligibility and the legitimacy of decision-makers. In certain cases, such as the EU, one or several competition agencies can take decisions leaving only a secondary role of judicial review to the courts and jurisprudence. In other cases, such as the US, the courts and jurisprudence have a more primary role.

A second variable concerns the dominant logic of action. Eligible decision-makers apply competition policy either according to the principle of written rules (*per se*) or according to the 'rule of reason'. In the first of these instances, the competition authority punishes an infringement of the rule itself (eg. the forbidding of bundled sales), whereas in the second the authority analyzes the real or potential anti-competition effects of the incriminated practice, as well as its impact upon efficiency (eg. by ascertaining whether restricted sales have an anti-competition effect, reduce the efficiency of the market or result in a loss of consumer well-being).

A third variable concerns the procedures of decision-making. In the case of concentrations (mergers and joint ventures), competition policies can function through demanding firms to 1) make *ex ante* notifications and authorizations, 2) through *ex post* verifications, ie. regimes of legalized exceptions. In the first instance, a merger is considered not to be complete until the relevant competition authority has validated it. In the second, the concentration will take place but remains under threat of a control. In the third, the inter-firm agreement can only be challenged if the competition authority decides to do so. This variation in procedures has numerous consequences. For example, regimes of legal exemption tend strongly to increase the role of third party complainants. More generally, each procedure tends to bias the burden of proof towards different protagonists and accord a varying role to the courts.

The fourth variable concerns the hierarchy established between the different objectives of competition policy and its effects upon the relationship between its respective instruments and principles. For example, if monopolies are authorized so long as they improve economic efficiency and consumer welfare, the principles of *per se* rules and regimes of legalized exception tend to apply.

In summary, competition policy can and does take many forms. As a form of intervention in the economy, it is sometimes seen as contradictory with liberal economic and political theory. However, the minute one looks more closely things become far more complex. As we set out below, the main reason for this is heterogeneity within neo-liberalism: although reasoning from the general precepts of liberal theory, and initially in opposition to neo-mercantilist economic theory, actually a range of liberal and neo-liberal doctrines have been developed. Indeed, particularly since the 1970s, these tensions and conflicts within liberalism itself have considerably influenced the general development of competition policies.

1.2. The initial doctrines behind competition policy: structuralism and the neo-mercantilist/neo-liberal conflict

Formalized competition policies began at the end of the 19th century through the adoption in the US of the Sherman Act in 1890 and the Clayton Act a generation later in 1914. At that time, economic theory had yet to explore the issue of competition policy. Instead, politicized 'objective necessities', notably the 'excessive' power of large trusts (eg. that of John Rockefeller's Standard Oil or those of merchant bankers like J.P. Morgan), were transformed into public problems that fed into the institutionalization of instruments first stabilized in the Sherman Act. Very soon thereafter, however, economic theorists began to invest heavily in this field of study and public action.

The first to do so were specialists of 'imperfect competition' who sought to grasp its consequences. In this vein, 'structuralists' such as Mason and Bain gave birth to the paradigm of research known as 'Structures-Conducts-Performances' (SCP) which came to shape US competition policy for many years around one central tenet: market structures in general, and entry barriers and concentration levels in particular, determine firm behaviour (and thence prices, growth and consumer welfare). From this starting point, structuralism gave rise to a competition policy doctrine that aimed to limit dominant positions because they were seen as causing *upso facto* abuse of competition (Brandeis, 1934). Consequently, structuralism as a doctrine strongly encouraged competition authorities to examine levels of competition (in terms of market share) and, through implementing *per se* rules, to forbid categories of practices (eg. monopolies or cartels) – all this in the name of the beneficial effects this outlawing was considered to procure.

However, structuralist theory had its opponents. Indeed, historically the principal opposition in economic policy in general, and within competition policy in particular, has been between neo-mercantilists⁴ in favour of protectionism, state intervention and economic planning on the one hand and a range of neo-liberals on the other. Neo-mercantilists have never developed a genuine doctrine for competition policy as such. Rather they have argued in favour of industrial policy and the direct intervention of the state in the economy as a substitute for competition⁵. Similarly, centralized planning was to be used in order to allocate resources with the aim of conserving the advantages of political freedom so central to liberalism whilst avoiding the 'anarchy' of free markets. Taking theoretical and practical nourishment from the mercantilism of the 16th century and, in the French case from 'Colbertisme', consequently neo-mercantilists developed a form of governmentality based upon state action via sectoral industrial policies (eg. subsidies, nationalizations, encouraging 'national champions', price controls) (Jobert & Muller, 1987). In the 1930s, these doctrines also took support from certain socialist and conservative thinkers and actors. But what is important to underline is that the reformalization of these doctrines at this time, and in particular the importance granted to

⁴ This category of thinkers and actors is very wide as it includes those who are generally described as *dirigistes* or planners. Deeper analysis would obviously differentiate within neo-mercantilism. For our purposes here, however, they will be grouped together.

⁵ Neomercantilism is of course much more a theory of co-operation and corporation. Here we reiterate the point made earlier where we recognize that it is reductive to categorize as neo-mercantilist all the proposals which derived, in one form or another, from the alternative models to the market economy which flourished in Europe throughout the 20th century (Maier, 1987).

competition policy, also took place through an opposition to changes and reformulations within liberalism itself.

The genesis of neo-liberalism is an enormous subject that obviously extends way beyond the scope of this paper. What is important to grasp when looking back at the 1930s is both the continuing ideological power of liberalism, but also of its perceived ‘failure’ as a means of governing actual economies. Previously the political power of liberalism had always stemmed from an alliance of actors who basically agreed on the need to limit the role of government, the positive economic and political effects of price stability and international peace. However, as Denord relates in detail (2007), the depression of the 1930s led to a generalised perception that classical liberalism had ‘failed’ and, therefore, that a new form of liberalism needed to be invented. For a range of reasons related to World War II, the neo-liberalism sketched out at the end of the 1930s only re-emerged politically in the form of doctrine during the late 1950s. What is important to underline for this paper is not only that three forms of neo-liberalism emerged from this process, but also that each possessed its own approach to competition policy:

- a ‘Chicago school’: first developed in the 1930s in opposition to Roosevelt’s planism;
- ultraliberalism (later known as libertarianism): rooted in the neo-marginalist economics of the Austrians Von Mises and Von Hayek;
- ordoliberalism: first developed within ‘the Freiburg school’ by authors such as Walter Eucken, Wilhelm Röpke, Franz Böhm, Alfred Müller-Armack and Walter Rüstow.

If the partisans of these three neoliberalisms disagreed over several important points of economic doctrine, they shared a fundamental opposition to neo-mercantilism. In particular, thinkers and actors from these three ‘schools’ all considered that planning and state intervention would always be incapable of replacing the market⁶. Instead, from the 1930s onwards within most liberal thought economic policy came to be seen as a method of government based upon knowledge of the practical effects of certain measures upon the economy. Self-limitation on governmental power was thus to be based upon a principal of truth –the truth as revealed not only by science but by markets through prices. For this reason, these *neoliberals* came to see their own theories and doctrines as an art of government based upon the market as a standard of truth⁷.

Overall then, the debate begun in the 1930s between holders of renewed liberal doctrine and neo-mercantilists updated and extended a centuries-old cleavage between those who doubted the all-encompassing powers of government and those who believed that such powers were the key to greater social welfare.

1.3. Debates within neoliberalism: the Austrians, the ordoliberals and the Chicago School

Ever since the 1930s, developments within the discipline and practice of economics have had a strong impact upon the economic doctrines of three sets of neoliberal thinkers and actors. Within this intra-neoliberal debate, doctrines on competition policy have often been at the forefront.

⁶ And this because the planner could never hold all the information necessary to run an economy effectively, whereas free markets allowed preferences and knowledge to be expressed via prices. More fundamentally still, as Foucault underlined (2004), liberalism is a governmental rationality which came into being as a reaction to mercantilism. Whereas the economic policy of the latter was ‘an art of government’ founded on maximizing the wealth and the power of the sovereign through state intervention, liberal economic policy emerged as a means of self-limiting governmental power through law and other policy instruments.

⁷ Significantly for this paper, and as Foucault also underlined (2004), neoliberals considered that this form of government should also extend to international relations through the principles underlying cross-border trade. Here balance between the nation states of Europe was seen as being best achieved by encouraging free competition and avoiding the protectionism of mercantilists. Whereas the latter saw international trade either as a zero-sum game or even as having negative impacts upon both domestic wealth and international peace, liberals saw free trade as contributing to stability between nations.

1.3.1 The Austrian School: an ultraliberal competition doctrine

If authors such as Von Mises and Von Hayek have always refused the name neo-liberal (considering themselves to be the descendants of 'naturalist' liberalism), the latter in particular is seen as its 'patriarch' (Denord, 2007: 297). Their approach sees markets as spontaneous orders produced over time by a process of learning and selection strongly linked to competition which eliminates 'inefficient' institutions and reveals relevant knowledge to economic actors. Put another way, according to this theory, markets are always in a state of disequilibrium within which inter-firm competition obliges their respective agents to find new knowledge and thence to innovate. It follows that for such authors all public intervention in the economy is criticized because the 'constructed order' it creates is based on the premise that public authorities are able to marshal all the relevant information when making their decisions. Instead, for authors like Hayek a market economy is complex and certain knowledge and information can only come to light through the spontaneous processes linked to competition and the existence of free prices. For this reason, this school conceptualizes entrepreneurs as a general category of economic actors all seeking profits within a world that is uncertain and constantly changing. Indeed, the latter are seen very positively as the explorers of new productive options and as creators (Kirzner, 1997). The ventures and errors that mark this process favour exploration and the discovery of new knowledge and attempts to equilibrate the market, often through seeking monopolies which, however, will always be temporary. Schumpeterian and evolutionist economics extends this approach to competition by underlining the positive role in the economy played by entrepreneurs and by innovation. Indeed, according to this theory, entrepreneurs conduct innovation in the hopes of gaining temporary monopolies.

The consequence of this theory for the doctrine of competition policy is that monopolies *per se* are not condemned firstly because they constitute a reward to entrepreneurs for innovation and, secondly, because their temporary nature results from their generation of follower firms who will eventually challenge the dominant competitors. More generally, this theory incites the complete absence of economic policies, including in the field of competition, in the name of pure *laissez faire*. If this approach indirectly maintained a certain degree of vitality through its influencing of the Chicago school (see below), its influence upon the actual government of inter-firm competition has been even less direct (particularly in the EU).

1.3.2 Ordoliberalism: a competition doctrine designed to build 'social market economies'

In contrast to the Austrian school, over the last sixty years ordoliberalism –a clearly declared neo-liberalism that breaks with naturalist liberalism- has influenced this field of EU government considerably. The specific argument consistently made by ordoliberals has been that *the market and competition are not natural, just as free and unfettered competition is not a spontaneous social fact*. Instead, pure competition must be produced by an active form of governmentality: one must govern for the market not by the market. Consequently, the state must institutionalize competition through the establishment of rules and institutions and, in particular, the outlawing of cartels and monopolies. Whilst contesting the argument that competition always leads to monopolies, the aim of the holders of this approach is to establish and maintain a situation of permanent competition. Indeed, their ideal is an economy of Small and Medium-sized Enterprises (SMEs) with no monopolies or cartels. Indeed, from this starting point, according to Foucault (2004) ordoliberals wanted to establish a societal rather than an economic policy in order to ensure that each segment of society – whose overall aim was freedom and order- would be subject to the principle of competition. Crucially, above all competition and economic freedom thus had to be protected – consumer welfare being only a secondary consequence of fair and free competition. Moreover, according to the ordoliberals, all the above was to be achieved via the actions of the state.

Indeed, in order to attain the above-mentioned goals, ordoliberalism proclaimed that an economic constitution had to be institutionalized which would define ‘the social market economy’⁸ through which the economic rights of individuals would be protected and guaranteed. More precisely, one of the key constituting principles of this approach was ‘safeguarding free market access and free competition, a duty to be accorded to an autonomous authority for controlling monopolies and cartels’. According to Bilger (2005: 4), this dovetailed with a horizontal principle ‘according to which every measure of economic and social policy had to satisfy the criteria of being in conformity with the logic of the economic system in order to avoid all the incoherencies of public intervention which generally cause such a system to dysfunction’.

Theoretically ordoliberalism makes a strong distinction between the framework and the process of economic policy – a distinction which in terms of doctrine translates into a different status being accorded to ‘ordering’ policies on the one hand and, on the other, to ‘regulatory’ policies such as that of competition. The latter category was supposed to be established only when they conformed with the constitutional principles of ordoliberalism and when structured by rigorous legal rules which would prevent public authority intervening in any way other than that indicated by the market and the principle of economic freedom. Indeed, for ordoliberals price was the best criteria upon which to base the regulation of markets. Consequently, competition has to be fair and free from all distortions caused by state interventions. As with structuralism, the first generation of ordoliberalism had a strong dislike of cartels and monopolies. Moreover, it was strongly in favour of *per se* rules and *ex ante* authorisations. Indeed, to adopt a helpful distinction developed by Schweitzer (2007, 18), ordoliberals were committed to forbidding not only the ‘exploitative abuse’ of competition but also all forms of ‘exclusionary abuse’.

1.3.3 The Chicago School: a neo-classical critique of structuralist competition policy

If, as we shall in Parts 2 and 3, if ordoliberalism played an important role in forging both the competition policies of West Germany and the European Communities, in worldwide terms the largest sources of inspiration for doctrines within this policy area are located within the different neo-classical approaches to economics. The latter is of course vast and first needs unpacking into at least three strands that are briefly sketched below in chronological order.

The first to emerge was an approach known as ‘Law and Economics’. Developed mainly by academics at the University of Chicago, at least two periods of work can be distinguished. In the 1930s a sustained critique of the planism of the Roosevelt presidencies was developed. Much of this critique also attacked the structuralist approach to competition policy that at the time was being argued for by various economists and lawyers at Harvard (eg. Brandeis, 1934) (Wigger, 2008). But Chicago is even better known for a second wave of publications and political work around competition policy developed in the 1970s by economists such as Posner (1976) and Bork (1978). According to this perspective, if monopolies exist this is because they are either ‘natural’ (because their greater efficiency has legitimately eliminated their inefficient rivals), or because the state has protected them. For this reason, antitrust laws are only seen as necessary in certain instances. However, in the main this approach strongly claims that policies aimed at establishing ‘pure’ competition are not efficient. Consequently rules that are too general should be avoided in favour of more pragmatic ‘rules of reason’. Indeed, the antidote proposed by the Chicago school has been to incite competition authorities to analyze efficiency within markets, and this by using neo-classical economic theory in order to determine whether the behaviour of firms is anti-competition or not. To return to Schweitzer’s distinction, this approach urges competition authorities to discard the concept

⁸ This term was invented by Alfred Müller-Armack, not only an ordoliberal economist but also one of the main advisors of W. Eucken and, as such, one of the key negotiators of the Treaty of Rome. It is important not to confuse the term ordoliberal with social democrat approaches to society and the economy or, more recently, that of ‘the third way’.

of ‘exclusionary abuse’ of competition in favour of the discovery and outlawing of ‘exploitative abuse’ (2007, 18).

A second neo-classical approach developed by Williamson (1975) around the concept of ‘transaction costs’ also provided a set of criticisms of state intervention in the regulation of competition. According to this theory, ‘hybrid’ forms of economic activity (cartels, vertical restrictions, alliances etc.) emerge because they are efficient means of reducing transaction costs. The theory therefore concluded that forbidding them ran counter to the quest for an efficient economy.

Finally, the most recent neo-classical approach developed is that of ‘industrial organization’. Using the computerized mathematical models and game theory that both began to be formalized in the late 1970s and 1980s (Baumol, Panzar & Willig, 1982; Tirole, 1988), this approach sets out to detect imperfect competition by predicting how markets will operate under different scenarios (Lyons, 2008). At the heart of the approach is a concern for the efficiency of rules and tariffs. In general, the approach postulates *first* that if a market is competitive, and even if pure competition is not in place, the market is still efficient⁹; *second*, that rules tend to create barriers to entry¹⁰; and *third* that competition policies are often inefficient.

When applied to specific cases of competition, market efficiency is measured here either in terms of Pareto optimality or using criteria such as consumer, producer or global surpluses. Firstly, neither of these methodologies leads necessarily to the condemnation of monopolies so long as new entrants are not discouraged. Secondly, collusions and cartels are not always to be forbidden either. Using the theory of non-co-operative games, this approach shows that tacit collusions can be just as important in certain markets and that, therefore, outlawing all collusion is very difficult to achieve. Thirdly, when applied to the issue of mergers, this approach argues that it is very difficult to predict in advance the favourable effects of such operations in general, and their potential synergies in particular. Finally, price discrimination and sales restrictions are not necessarily seen as inefficient and illegitimate.

Overall, therefore, developments within neo-classical economics have progressively produced a ‘post Chicago’ consensus which concludes 1) that competition policy should not be used to outlaw many economic practices that other theories, and notably ordoliberalism, would have automatically forbidden; and 2) that nevertheless competition policy still has an important role to play in certain types of cases so long as their adjudication is made on the basis of ‘economic’ analysis studied in terms of efficiency and consumer welfare. On this basis, as Bruce Lyons, a British economist and participant in this movement, forcefully concludes, not only has ‘a transatlantic consensus’ been achieved between most economists who ‘draw essentially on the same toolkit’, but ‘a new sub-discipline of competition economics, much more nuanced to legal ideas and practical policy, has emerged’ (Lyons, 2008: 7-8)

In summary, this section has begun to problematize the development of competition policies throughout the world as occurring alongside developments within the science of economics. Indeed, as table 1 highlights, the latter process has entailed a great deal of division and conflict which has frequently spilled over into the decision-making arenas of competition policy. In the following parts of this paper, we seek to follow the intertwined nature of academic and practitioner debates by retracing its impact upon key developments in the EU’s competition policy. In so doing, particular attention will be paid to 1) the actors and actor-coalitions who have ‘carried’ economic theories and

⁹ Note the similarity here with the theory of the Austrian school (Kirzner, 1997).

¹⁰ Here Stigler’s theory of ‘regulatory capture’ (1971) sought to show that inefficient monopolies were often the production of state intervention.

doctrines into EU debates or negotiations; and 2) the instruments of regulation that have been put in place and institutionalized as a result of the compromises this process has entailed.

Table 1: Doctrines of competition policy and their respective governmentality

	<i>Planism/ dirigisme/ mercantilisme</i>	<i>Structuralism</i>	<i>Ordoliberalism (first generation)</i>	<i>Chicago & Williamson</i>	<i>Austrian School & Schumpeter</i>
<i>Scope of state intervention in inter-firm competition</i>	No limits: the state as organiser of economy; planning or industrial policy replaces competition policy	Quite strong	Defined & limited by economic constitution & principle of conformity	Very limited	None: nightwatchman state (minarchists) or absent state (libertarians)
<i>Theory of competition and markets</i>	Markets as inefficient, state as substitute or supplement to market, state owned companies seen as beneficial	Static and structuralist	Markets & competition built by state ; competition as a process	Static efficiency (equilibrium & optimum) with some dynamic elements (evolutionist game theory and 'contestable markets')	Dynamic process of discovering knowledge & selecting rules; spontaneous & catalytic order
<i>Per se rules vs rules of reason</i>	<i>Per se</i> dominates but preference for intervention without rules	<i>Per se</i>	<i>Per se</i>	Rules of reason ; strong preference for common law	Absence of competition rules; preference for common law
<i>Values defended</i>	Efficiency and perhaps justice	Efficiency, consumer rights	Economic freedom, absence of distortions & welfare (growth & consumer)	Efficiency/consumer & global surpluses (1) and freedom (2)	Freedom and efficiency as its consequence
<i>Ex ante authorization or legal exceptions</i>	<i>Ex ante</i>	<i>Ex ante</i>	<i>Ex ante</i>	Legal exceptions	No competition policy

2. Economic Doctrine and political work during the establishment of EC competition policy: Ordoliberalism vs Neo-mercantilism (1950-1969)

As has been widely documented, the initial institutionalisation of the principle of competition as organiser of the economic life of European-wide capitalism took place in the period after World War Two. However, it was the crisis of laissez-faire Liberalism in the 1930s and the perceived threat of state planning (be it socialist or fascist) which fundamentally provided the ideological debate within which competition policy became a central plank for the renewal of Liberalism (Denord, 2007; Dardot & Laval, 2009). Problematizations of this crisis first impacted upon the governmentality of the new state of West Germany and then upon proposals for the invention of a European-wide scale of competition regulation.

Most recent research has credited a particular strand of Neo-liberalism -German Ordo-Liberalism- as being the main intellectual and political force behind the institutionalisation of competition policy at the European scale (Commun, 2003; Wegmann, 2002; Kolowski, 2000). In particular, this research shows that at this time Walter Eucken and his Freiburg School had carried out the most important academic research on competition law and policy from both legal and economic perspectives. It also shows that the central role of a theory economic development based on a state designed to ensure competition only became dominant after 1945 because of the appointment of Ludwig Erhard as Minister of Economic Affairs in Bavaria, and from 1949 of the whole of West Germany. Erhard's major adviser was Alfred Müller-Armack, Professor of Economics and Cultural Sociology at the Universities of Münster and Cologne. This catholic (and former member of the Nazi Party since 1933) devised in 1946 the concept of *Sozialen Marktwirtschaft* (social market economy) which came to act as the cornerstone of a political and intellectual movement. In 1953, the latter took the form of a network (*Community of Action on behalf of the social market economy*) with a strong foothold in the West German government (Müller-Armack had just been appointed head of the new planning office (*Grundsatzabteilung*). At that time Müller-Armack had already developed an important set of reflections about why competition had to rule all social and human relations putting the market at the service of free citizens. (Ptak, 2004). These reflections were then made to have political effects through the adoption of 'the social market economy' as a central objective of the new party which was to rule West Germany for most of post-war period: the CDU.

Other recent historical research, however, has also contributed to a myth that a European-wide institutionalisation of competition policy was the most important long-term political victory by German Ordo-liberals over French planners and neo-mercantilists (Gillingham, 2003). According to what has become a dominant academic and actor narrative, an Ordo-liberal network (headed within the EEC by the long-serving German Commissioner -Hans von der Groeben- his head of cabinet, Ernst Albrecht, and legal adviser Ernst-Joachim Mestmäcker-), (Von der Groeben, 1987; Von der Groeben, 1995; Von der Groeben, 2002) managed to make inter-firm competition (*Wettbewerbsordnung*) into the pivot around which the European Communities were institutionalized and its member states transformed. In short, according to this narrative Ordo-liberalism transposed West Germany's *Ordnungspolitik* into the *de facto* economic constitution for European integration (Gerber, 1998)..

Like all inventions of tradition, the myth of an European competition policy exclusively shaped and directed by 'the European Pilgrims of Liberty' has been widely exaggerated – not only by 'the Founding Fathers', but also by their ideological followers and disciples within the discipline of law (Mestmäcker & alii, 1986; Hrbek, R. & Schwarz, 1998). Just as significantly, this myth is increasingly uncritically accepted by a large number of economists, political scientists (Quack & Djelic, 2005) and, more recently, historians (Leucht & Seidel, 2008, Leucht, 2009; Seidel, 2009; Denord & Schwartz,

2009; Dardot & Laval, 2009). In order to challenge this mythical version of EU history in general, and that of competition policy in particular, in this section we map the organizations, stakeholders and dominant actors who actually shaped EU competition law and policy at crucial moments between 1945 and 1984. In so doing we show that EC competition law and policy was not simply the victory of a transnational cabal directed by German intellectuals turned into policy-makers. On the contrary, law and policy stemmed instead from a failure of both the original proposals of the ordoliberalists and of their effects upon firm and national government behaviour.

2.1. Competition and the creation of the European Coal and Steel Community

2.1.1. An antitrust policy-network inspired by the USA's example?

The dominant interpretation of German *ordo-liberalism* as the cradle of competition policy in Europe builds upon a previous historiographical myth: that European post-war recovery and subsequent economic growth was to a great extent the result of the post 1945 “Americanisation” of Europe. After several decades of debate, this hypothesis has been seriously reviewed, and even the most ardent tenants of the Americanisation hypothesis no longer attribute to American international policies and business transfers all the credit for the “catching up” of European countries. (Eichengreen, 2007)¹¹ However, in the field of the introduction of competition law in Europe, the prevalent view is still that this was part of the institutions which were imported into Europe from the other side of the Atlantic.

To supporters of this thesis, the most evident channel of such influence was Germany, where the USA as dominant occupying power had as official policy the decartelisation and deconcentration of large trusts (*Konzerne*), mainly steel-coal holdings – and this as a means to control the future rearmament of Germany (Gillingham, 1991). Indeed, from the beginning of 1948 the Americans pushed to introduce competition law in Germany in order to ensure the continuity of the deconcentration of German industry. However, this draft bill, the Josten draft, which like in the US tradition introduced a total ban on cartels, was never approved nonetheless because Erhard opposed it. (Berghahn, 1986) Moreover, it was not until 1957, when the Treaty of Rome had already been negotiated, that this first German anti-trust law came to be enacted through the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) (Marburg, 1964; Voigt, 1962).

Notwithstanding this evident ‘failure’, the most recent historical research has argued that the anti-trust articles of the Treaty of Paris were the result of a transatlantic policy network made up of academics, civil servants and statesmen, wherein the legal traditions of American anti-trust and *Ordo-liberalism* converged. (Leucht, 2009) It is important that we take this hypothesis seriously because it claims that there has been a strong path-dependence and continuity in European competition law and policy for more than half a century. The evidence highlighted by these historians was that some prominent actors of the German negotiation team of the Treaty of Paris were legal advisers to its head: Professor Walter Hallstein. These advisors were Professors Hermann Mosler, Hans-Jürgen Schlochauer and Carl Friedrich Ophüls, all of whom had been involved in academic-Georgetown University- and Marshall Plan exchanges to introduce laws safeguarding competition in Germany.

First of all, it is difficult to argue that *Ordo-liberals* were at the origin of articles 65 (anti-cartel) and 66 (anti-monopole) of the Treaty of Paris, because it was not from the German delegation which came the request to introduce these articles, but from the French delegation headed by the proponent of the Schuman Plan, Jean Monnet. A possibility to surmount this inconvenient evidence

is to argue that Jean Monnet was also part of this precocious anti-trust German-French network originated and mediated by the American diplomatic and academic establishment due to his well-known US contacts. In this line, tenants of the Americanisation hypothesis have argued that the holders of 'the magic recipe of antitrust' to Monnet were the American embassy in Paris and all its European network through the Marshall Plan administration, more particularly the Law Professor from Harvard, Robert Bowie, member of the American occupation authority of Germany, who would have drafted the suggested articles.

However, the problem with this vision of Monnet supposedly having an American anti-trust culture is that in the draft of the Schuman Plan declaration that he had prepared there was already a very vague mention of cartels which stated that the ECSC did not want to become an international cartel. Jean Monnet only came with a draft of anti-trust articles four months after the declaration of 9th May 1950, thus shedding considerable doubt upon this interpretation. If the Americans were indeed informed of events and even if Bowie have been involved in the drafting of these articles on competition, the question remains as to why the French delegation would have accepted as early as 27th October 1950 to become the voice of an anti-trust tradition which was not its own?

For the tenants of the Americanisation hypothesis, Monnet was an admirer of New Deal legislation and from his position of Commissioner of Planning in France had attempted to introduce at the beginning of 1949 an anti-trust bill inspired by American anti-trust law (Kipping, 2002). Historians have yet to find its first draft but Monnet himself mentioned in his memoirs that he looked for the advice to introduce anti-trust articles from Paul Reuter (Monnet, 1976).¹² This Christian-Democrat Lawyer had worked in the cabinet of Pierre-Henri Teitgen and was at the time the legal adviser of the Quai d'Orsay directed by Robert Schuman, that is, not really a representative of American anti-trust tradition (Cohen, 1998).

In any case, if there was a French political thrust towards anti-trust clauses at the supranational scale, they were not linked at all to Ordo-liberalism or the USA, but to French Socialism. The first prominent politician who requested the French government to introduce anti-trust legislation to fight against price-fixing was the left-wing Socialist Albert Gazier in a resolution of December 1948 in the Economic Affairs Commission of the French National Assembly. Moreover, it was a French Socialist like André Philip, former president of the Socialist Movement for the United States of Europe and former Minister of Economy and Finances until the end of 1947, the pioneer in asking anti-trust at European level. He did so during the preparation of the Economic Conference of the European Movement held in Westminster in 1949, where he defended the creation of an anti-cartel law for basic industries like steel and simultaneously an authority in charge of implementing it. Indeed, only a few months before the Schuman Plan negotiations, Philip was the only French policy-maker who had publicly favoured a European Steel Authority in charge of applying an European anti-cartel law, and this because he considered the working groups of the Organisation for Economic Cooperation in Europe would be incapable of preventing the restoration of the international steel cartel of the interwar period ¹³(Kipping, 2002)..

As it is very difficult to evaluate the actual impact of these antecedents in the introduction of antitrust articles in the negotiations of the ECSC, most historians agree that the new French proposal for these articles was directly linked to a perceived national interest which had led, two months earlier, to a decision taken jointly by the Americans and the French to issue a regulation in occupied Germany to deconcentrate German steel trusts (Griffiths, 1998). Consequently, the ECSC's articles on competition were shaped more by a politically-worked construction of French national interests than

¹³ For Kipping, Philip was a man well-informed about the American conceptions of the economy despite being a Socialist planner. Contrary to his view I do not see any basic contradiction between both elements of Philip's biography.

by any German Ordo-liberal influence, previous 'failures' of anti-trust activity in Germany or France, or due to American traditions of Anti-trust.

2.1.2. Articles 60-61 of the Paris Treaty: Constructed national economic interests more than Ordoliberal ideology

The two anti-trust articles presented by Monnet on 27th October 1950 to the delegations of the Six were aimed at nothing less than the banning of cartels (article 60 in the original numbering) and the establishment of merger control (article 61). It is true that the Americans, more precisely Bowie and the US Department of the State, had the opportunity to check them before their official presentation and agreed with them. Both articles, however, went much further than the American requests of avoiding price-fixing. In article 60, the French suggested a total ban on cartels, defined as all agreements and practices that hindered free competition including price fixing, production quotas, and the partition of markets, products, customers or material resources.¹⁴ Article 61 was even more innovative because it introduced merger controls by the High Authority of the ECSC. This article aimed to counter all agreements or practices aiming at securing a market-dominating position for one enterprise, including the concentration of firms. More precisely all mergers had to be authorised by the High Authority on the basis of contributing to the general interest of the economy, which in practice would have meant that it was not bound to any condition to take its decisions, even if a control of more than 20% of the coal and steel market by a single legal entity was forbidden. To implement this interdiction the High Commission of the ECSC would have large powers to declare and terminate these agreements or practices with the use of penalty fees.

As these articles went much further in a sense of political intervention in economic sectors than the US anti-trust, we can conclude that the French position was not simply the one pushed for by the Americans. More definitive about the real thrust behind these articles are the note of 20th November and some letters exchanged between Schuman and Monnet which confirm that the French introduced the merger article in order to pursue the deconcentration of the Rhur steel industry initiated by the occupying authorities of Germany (Witschke, 2001; Witschke, 2003; Witschke, 2009)

The Ordo-liberal spirit was however definitively present elsewhere than in the negotiations because a German internal proposal of 21st October 1950 did not favour the banning cartels as such, but made their approval depending on the High Authority, showing that the French proposal was more ambitious than what the Germans could tolerate (Schulze & Hoeren, 2000). Moreover, Erhard did not support tackling monopolies and, instead, defended the viewpoint of large companies that would be affected by the parallel process of German deconcentration and the anti-trust provisions for the coal and steel treaty. Whereas the Italian and the Dutch delegations supported the French, the German, Luxembourgian and Belgian delegations contested both the general ban on cartels and the attempts to put under control mergers with previous authorisations. According to American sources, 'Belgium' and 'Luxembourg' feared that this clause would affect the economic freedom of their respective steel and coal holdings, the Société Générale de Belgique and the ARBED (Witschke, 2001).

Finally, after some important negotiations with the other Five, on 7th December, again the French suggested the final drafts which were ultimately approved with minor modifications in the Treaty of Paris as articles 65 and 66. Whereas article 65 confirmed a total ban of cartels, the High Authority retained the right to authorise some precise agreements in very precise and restrictive circumstances, article 66 gave the High Authority the capacity to authorise a priori all mergers. More

¹⁴ MAEF, DE-CE, 500, Number 18, Propositions relatives à la mise en œuvre du Plan Schuman en ce qui concerne les accords et les pratiques restrictives ou tendant à la constitution de monopoles, 27-10-1950, quoted in Leucht (2009) p.72.

interesting was article 67 which allowed members states to make exceptions in period of economic crises, opening the door for a public-private management of these two central industrial sectors. As we saw earlier, and will appreciate, later, these were not at all clauses which could be acceptable, not to say a reference, for German *ordo-liberals*, given the strong, decisive interventionist power on crucial industrial sectors awarded to a political authority like the future High Authority, which was to be chaired by Jean Monnet in person.

Summing up, this section has demonstrated that the inclusion in the negotiations of the ECSC Treaty of antitrust articles to be applied to European steel and coal industries did not derive from any previous antecedent coming from Germany or the US, nor from an *ordo-liberal* network. Instead, these clauses resulted from the political work carried out by representatives of each member state armed with perceptions of their respective national interests. These actors included representatives of Erhard's 'Social Market Economy Germany' who also defended the position of their steel and coal industries as 'strategic' for the general economic development of their national economy. In contrast, there is no substantial evidence to support pleas in favour of path dependent causation between previous attempts to create general anti-trust laws in France and Germany and articles 65 and 66 of the actual ECSC treaty.

2.2. The institutionalisation of competition principles in the Treaty of Rome

Between the ECSC Treaty and the Treaty of Rome the question of institutionalising competition became salient not only within the ECSC system in charge of implementing articles 65 and 66 but also within each of its major member states. It is important to briefly review the steps taken by each country towards creating national anti-trust provision because when the Messina negotiations - which ultimately gave birth to the EEC- started in 1955, there were already several institutionalisations of the principle of competition in some ECSC member states (France, Germany and the Netherlands), whereas in others (Belgium, Italy and Luxembourg) there was not. This point is of fundamental importance to understanding national positions, ideological traditions and the perceived economic impact of an European anti-trust regulation during the negotiations that produced the Treaty of Rome. This was largely because a fundamental issue surfaced during these negotiations: whether the countries without any anti-trust law would have to regulate their respective economies using the principles set down in the forthcoming Treaty?

2.2.1 Negotiating competition principles from Messina to Val Duchesse

The introduction of competition policy within the Treaty of Rome became from the very beginning a demand of the German delegation in the 1955 Messina negotiations- and this using the argument that it was not possible to guarantee a Common Market without rules on competition.¹⁵ The head of the German delegation was Hallstein, seconded by the German representative in the drafting of the Spaak report, the *ordo-liberal*, Hans von der Groeben, (in charge of following the ECSC in Erhard's ministry of the Economy). Along with the French Socialist Pierre Uri, von der Groeben became one of the two hands charged with drafting the Spaak report (the draft Treaty for the negotiations in Val Duchesse). The synthesis worked out by Uri and von der Groeben was more marked by their experience of the failure of the ECSC's anti-trust measures as Pierre Uri was from the very beginning of the ECSC its director of its section of Economic Analysis and the German represented its country in the Council of the ECSC.¹⁶

¹⁵ European Navigator (www.ena.lu), doc.24292, Mémorandum du gouvernement fédéral d'Allemagne sur la poursuite de l'intégration, 01-06-1955.

¹⁶ Witschke, T. (2003), *Gefahr für den Wettbewerb? : die Fusionskontrolle der Europäischen Gemeinschaft für Kohle und Stahl (EGKS) und die "Rekonzentration" der Ruhrstahlindustrie 1950-1963* (Phd EUI Florence, 2003).

Chapter III of the Spaak report on “Monopolies” suggested that the simple removal of barriers would not permit an end to the national discriminations between companies, particularly in relationship to prices. If national barriers were substituted by private cartels between industrialists, they could create positions of monopoly which would eliminate the potential gains from the common market. For this reason the competition articles were to be put to the service of the construction of the common market by sanctioning at least three precise situations of monopoly (market sharing, production quotas, monopolistic domination). The institutional structure suggested was clearly a vibrant hymn to technocratic supra-nationalism. The Nation-States would not have any word in such policies whose concrete rules derived from the articles of the Treaty would be elaborated by the European Commission, who would also decide and control only supervised by the European Assembly (EA) in the rules and the European Court of Justice (ECJ) in case of appeal of a decision. As the workload was forecast to be very important, the Spaak report included two technocratic agencies: on the one hand the Commission would be flanked by a Consultative Committee with a role of arbitration and conciliation, meanwhile the Court would create a specialised chamber made of lawyers, economists and technicians. If this was not enough, the report pointed out that the first to be affected by the rules would be state-owned enterprises, opening the path to a more flexible application to private companies, which would be given a time of adaptation.¹⁷

We can conclude that the proposals in the Spaak report largely constituted a ‘perfect’ ordo-liberal model of European anti-trust law. Actors such as Von der Groeben, who had personally drafted these clauses, thus had high hopes that the national governments would start the negotiations leading to the Rome Treaty on this basis. Suffice to say at this point that these proposals did not coincide at all with the final shape that the member states signed in the Treaty of Rome. Indeed, analyzing the debate which took place during the negotiation of the Treaty of Rome allows one to reconstitute the preferences of each country in relationship to the kind of competition articles their representations desired. The three central questions at issue were cartels, monopolies and the institutional framework in charge of competition policy. Other important issues concerned the application of competition rules to State monopolies and public services.

2.2.2. From Val Duchesse to Rome

What was the German ordo-liberal proposal negotiated by von der Groeben and Müller-Armack in Val Duchesse? The basis was the writing of two articles: one for cartels and other for monopolies. The first included a general prohibition with very limited exceptions, meanwhile for the second the Treaty would only sanction the abuse of dominant position, either by a private company or a state undertaking. The most striking of the German suggestions was that they preferred to deal with the institutional structure in a separate Treaty to be drafted by the member states within two years or, if not, one year later the Commission would suggest a regulation to the Council, which would decide upon it by qualified majority. This lack of definition may have derived from the need to wait until the definitive approval of the German anti-trust law, which set up a special independent authority. In addition, Müller Armack was very clear in giving to the European Court of Justice the responsibility for reviewing cases and ruling upon them¹⁸.

The French delegation, instead, worked politically to put the Council of Ministers in control of the decisions for competition. According to this plan, the Commission would be in charge of the actual surveillance of the system through the harmonisation of national legislations, which would continue to be fully operational given that the articles concerned only when the cartel or monopoly included more than just one country, and they would not be directly applicable by Member States.

¹⁷ Archives Historiques des Communautés Européennes, (AHCE), CM3/NEGO 236M, « Extrait du rapport Spaak », 21-04-1956.

¹⁸ A preference for judicial intervention shared more by followers of Hayek and Chicago than those of ordoliberalism.

To avoid paralysis of the system, the Council would decide on these issues by qualified majority. Coming to the concrete content of the article on competition, the French pleaded for a single article banning both cartels and monopolies with special emphasis on price fixing, the restriction or control of production, the partitioning of markets, and the total or partial domination of markets for certain products by a firm or groups of firms. This general prohibition was, however, derogated by a general exemption articulated in three cases: that cartels and monopolies led to the improvement of production or distribution; that they foster technological or economic progress; and lastly, that they were carried out by state monopolies and public services.¹⁹ This position of the French delegation was to a certain extent influenced by its own domestic law (the idea of making the European Commission just a technical instrument was similar to its own Commission for cartels). Meanwhile political decision-making was to be returned to national governments which would have strong leeway to decide on exemptions.

In contrast, Italy, Belgium and the Netherlands were favourable to the European Commission as the responsible of the harmonisation of national competition laws, and this without waiting three years due to the insecurity that this project was creating among their business circles. However the two countries without competition laws, Italy and Belgium, diverged in relationship to the general ban of monopolies. Like on many other future occasions, the Mediterranean country joined France arguing that throughout the long transition period, the existence of national monopolies would harm European competition. On their side, the Benelux countries were favourable to the German thesis of preserving some monopolies for some time, punishing only the abuse of their dominant position.

In a previous paper dealing with the negotiations of the Treaty of Rome we have already explained in detail the position of French business in front of this negotiation (Ramírez Pérez, 2006). Here we will simply underline the main questions concerning the competition articles raised by the Groupement syndical des constructeurs français de l'automobile (GSCFA), the CSCA and Renault. This is important to understand that the French position was to a certain extent very distant from what some of the most important industrial lobbies requested from the Socialist-Radical government of Prime Minister, Guy Mollet. They advocated for the introduction in the Treaty of anti-monopole system to control the unfair competition within the new common market of American multinationals.

This consisted more precisely in the creation of a neo-corporatist Control Commission on Foreign Investments, which would be introduced within the Treaty and made by representatives of member states and European business associations by sector. The suggestion was to discriminate between EEC companies and non-EEC companies. This Commission would authorise all investments of non-EEC companies by sector and, it forbade that a foreign companies control more than 30% of the market of a member state, nor more than 25% of the whole EEC market. If so, the superior amount would have duty imposed upon it (as if the declared EEC production was in reality coming from outside the EEC).²⁰ In the subsequent memorandum sent to the French SGCI, the French private producers suggested that this Commission received information about all capital transfers coming or going outside the EEC countries. More crucially, its authorisation would be necessary for any take-over or merger but respecting the veto right of the host country. Like in the French position during the negotiations, French industrialists insisted upon a particular surveillance towards a price policy by companies which would be incompatible with the production condition within the EEC.²¹ This fear of the abuse of dominant position of American multinationals was also shared by the other automobile

¹⁹ AHCE, CM3/NEGO 236, Secrétariat du Groupe du Marché Commun, « Mémento interne de la réunion du 3 et 4 Septembre 1956 », 07-09-1956. *Idem*, Secrétariat de la Conférence intergouvernementale pour le Marché Commun et l'Euratom, « Tableau synoptique des projets d'articles soumis par les délégations concernant les règles de concurrence applicables aux entreprises », 18-09-1956.

²⁰ AR 0700 (55), « Projet de mémorandum du GSCFA sur le péril des investissements américains », 13-11-1956.

²¹ AHCE, SGCICEE-3114, GSCFA « Mémorandum concernant les problèmes posés par l'implantation de firmes étrangères au sein du marché commun », 12-12-1956.

French trade association, the *Chambre syndicale des constructeurs d'automobiles (CSCA)*, which equally asked for the suspension of the common market vis-à-vis them. Again, this scheme suggested the creation of a special Commission in charge of monitoring the means to set up 'fair competition' between EEC companies and American multinationals.²²

We know that these business concerns directly contacted the French negotiator Robert Marjolin, then secretary of the Interministerial Committee for European integration (SGCI), Jacques Donnedieu de Vabres, and the permanent French representative in Val Duchesse, Jean-François Deniau.²³ Marjolin attempted to introduce such a Control Commission on Foreign Investments but without success given the strong German and Benelux opposition, which only accepted that the European Commission had to be informed about foreign investments, and that it could just issue public recommendations to different countries. However, in a presentation of the Treaty of Rome to Renault's top management, Marjolin confirmed that the Treaty of Rome included a *"clause which allow us to protect the French market against an invasion of German-American or Belgian-American products: it is the article 86, quoted by M.Dreyfus in his article of this evening on the newspaper Le Monde, which deals with monopolies, and the general safeguard clause which would allow France the setting up of protective measures."*²⁴

These contacts between French economic circles and the French EC negotiators show very clearly that the agreement for competition policy within the Treaty of Rome, particularly its article banning the abuse dominant position, was not just a German *ordo-liberal* victory. Instead the French State, both the government and one of its major state-owned industrial companies like Renault, were more than satisfied with the article against monopolies. If it is certain that the German view prevailed on several points, it is wrong to conclude that the new articles about competition were introduced or drafted entirely according to the German proposal. Let us analyse the final articles in turn and what could be exactly attributed to the *ordo-liberal* Germans.

The first German success was that there were two distinct articles about cartels (article 85) and monopolies (article 86). The second was that it was agreed in article 87 to postpone the institutional decision within three years by unanimity or if later by qualified majority. However, the most fundamental accomplishment was that Germany convinced France to accept that in article 86 monopolies were not condemned by principle, but just the abuse of dominant position. We note here that the position of *ordoliberalism* is complex: clearly, for *ordoliberals* abuses of dominant position have to be condemned, because the aim is that dominant firms behave as if they were in a pure competitive market. However, they also often have a strong structuralist suspicion that dominant positions would lead to abuses, which explains their preference for *per se* rules. It could also be concluded that Germany had been partially successful in also including in article 90 state undertakings, and not just private companies. But this was far from being an *Ordo-liberal* sweeping victory if we look at the French demands introduced within the Treaty.

First of all, in article 86 the Treaty introduced a non-exhaustive list of forbidden practices, which in fact were those originally proposed by the French: the imposition of inequitable purchase or selling prices or of any other inequitable trading condition; the limitation of production, markets or technical development to the prejudice of the consumers; the application to parties of unequal

²² AHCE, SGICIEE-3114, Lettre du CSCA pour M.Donnedieu de Vabres, 15-01-1957. Sent also to Prime Minister Guy Mollet and other Ministers of his government.

²³ AR 0700 (55), « Note sur les conversations avec M.Marjolin », 28-12-1956 ; Archives Robert Marjolin (ARM) (Fondation Jean Monnet Lausanne), ARM18/01/04, lettre de Renault à Marjolin, 07-02-1957; ARM, 18/01/05, lettre du GSCFA à Marjolin, 11-02-1957; ARM 18/01/03, Note pour M.Donnedieu de Vabres, 01-02-1957 ; AN, SGCI, 910004/12314, Lettre des Usines Renault à Monsieur Deniau, 07-02-1957, citée par A.de Castelnaud, « Le rôle du SGCI dans les relations de la France avec le marché commun 1956-1961 » in R.Girault et alii, *Le rôle des Ministères des Finances et des Ministères de l'Economie dans la construction européenne (1957-1978)* (Paris, 2002), p.211.

²⁴ ARM 26/03/18, « Conférence de M.Robert Marjolin sur le marché commun au Service central de Formation », 17-07-1957.

terms in respect to equivalent supplies; and lastly, the conclusion of contracts to the acceptance by a party of additional supplies without connection with the subject of the contract. Moreover, this list was not exhaustive, but pointed out as explicitly forbidden these four cases, opening a highway for further prohibitions in the future. In this way the French managed to obtain as much as they wished from the Germans in this point despite of having renounced to a total ban of principle of dominant positions.

The same was true about article 85 on cartels which included all the particular French requests, both on the precise cartels to forbid and on three general, broad exemptions. On the latter they included the same four exceptions as in article 86, reducing in this way the effect of having created two different articles, but added another French request, to include market-sharing or the sharing of the sources of supply as a forbidden practice by companies. The most fundamental French victory concerned the three exemptions which authorised cartels were exactly those it had requested during the negotiations. These were much more precise and at the same time of very broad scope, against the German preference for strict and limited exceptions.

Lastly, on the institutional form of application of the Treaty, the decision was postponed due to a transitional clause for the next three years (articles 88-90) which de facto gave all the powers of application of the norms to the member-states in the Council, reducing the European Commission to a secondary role of surveillance and suggestion of solutions to possible actions going against these articles. The European Court of Justice was not even mentioned, and neither was any technocratic or special chamber that had been proposed in the Spaak report. If this was not enough to certify the extent of the German *ordo-liberal* defeat, one of the clearest German gains of including State companies under EC competition law was somehow attenuated by an ill-defined exception towards services of general interests or fiscal monopolies.

In conclusion, the competition articles ultimately applied to European firms by the Treaty of Rome were not caused or dominated by *ordo-liberal* ideas. Rather they were the result of a compromise between the perceived national interests of negotiating parties, mainly France and Germany, both of whom reached a synthesis which accommodated all French requests. The most important conclusion is that basically nothing remained from the Spaak report articles written by von der Groeben. Crucially, this means it is impossible to consider that from its outset the EEC possessed a definitive blueprint for competition policy. Instead, this was defined subsequently in and around an EC Regulation which was subsequently approved in 1961.

2.3 Regulation 17/1962: European business and national interests

As soon as the Treaty of Rome had been approved, different affected business quarters took public postures as regards the application of the articles on competition. Indeed, there was a clear sign of rising expectations about their direct effect within their national legal orders as soon as the Treaty of Rome entered into force in 1958. It is important that we develop here the debates and positions adopted by the interest associations representing multinational businesses and national peak associations as they provide us with an external, but interested, viewpoint about what had ultimately prevailed in the Treaty and the different alternatives which existed for the European regulation, the future 17/1962 regulation, tackling on competition articles.

The quickest reaction came from the oldest and most prestigious of business institutions, the International Chamber of Commerce, where the owners of the major trans-national companies of the world met. Founded in 1919 to stimulate international exchanges, the ICC still has a Secretariat

General in Paris and its Presidents have often been Americans or Europeans.²⁵ Apart from its national sections, it created also a series of working groups where European members are prominent such as the Committee on international business agreements affecting competition and the Committee for European Affairs. The former was co-president until 1957 by the French President of ELEC, Edmond Giscard d'Estaing, when he was appointed new President of the ICC for a period of two years.

Indeed, it was under Giscard's presidency at the ICC Council of Mai 1958 that this global forum of multinational corporations from all continents issued a resolution on the articles on restrictive practices in the Treaty of Rome, restating the previous position adopted by its Committee on international business agreements affecting competition some months earlier in December, after a detailed study presented in April by its *rapporteur*, Lucien Sermon. For this secretary general of the ELEC, the business branch of the European Movement, the problem was the general ban on cartels envisaged by article 85 and their automatic declaration as null and void. Multinational companies would have preferred, like in article 86 on monopolies, the condemnation of their abuse or negative effect. Moreover, they rightly saw in the French exemptions the door open to the "*arbitrary intervention*" of member states. But their worst case scenario was that these two articles would become the norm for those countries without competition law like Belgium, Italy and Luxembourg. For this reason the ICC requested that the European Commission publicly stated the general and non-compulsory nature of these articles before the drafting of the exact regulation developing articles 85 and 86, as foreseen by article 87.²⁶

The May 1958 resolution of the ICC Council provided also an important corroboration of the French victory over the German *ordo-liberals* in the question of public enterprise and service of general economic interest as they "*would benefit, following article 90, from a less rigorous treatment than some private enterprises in similar positions.*" But more importantly the ICC confirmed the fears of the Benelux and Italian delegations in the negotiations, namely, that the transition period of three years created uncertainty and concern among business leaders, because it was impossible for them to appreciate if their cartel agreements were forbidden. This uncertainty raised doubts about which companies would effectively profit from the creation of the common market, and called for a clear position of the Council on this question of the non-applicability of the EEC competition articles by national-governments until the new regulation had been passed. This position was not new because the ICC national chapters had sent this resolution to their national government, but without any clear effect. For this reason the ICC addressed this time a call to the Commission of the EEC to issue a formal statement about it.

Taking a clear stand on the future drafting of the future regulation, the ICC Council went much further, as it requested that the new regulation deepened exemptions for 'beneficial cartels' introduced in article 85. For this reason it also urged the Council to publicly present its general guidelines and criteria in this matter with a consultation of the interested parties prior to the future regulation. In the ICC view, it was of fundamental importance to decide on the criteria upon which it would be decided if a particular practice was contrary to articles 85 and 86, leaving exclusively to the European institutions, and not to national governments, the decision to forbid certain agreement or practices. This preference for supranational institutions was conditional to the finding of facts through a deep research and juridical enquiry proving the prejudice of an agreement, either by its object or effect, to the aims of the common market, to trade between member states, or to the free interplay of competition.²⁷

²⁵ Ernest Mercier, Alberto Pirelli, Georges Theunis, Rolf von Heidenstam and Edmond Giscard d'Estaing.

²⁶ ASF, Statistica, 36/2219, Chambre de Commerce internationale, Commissione internazionale delle intese, « Riunione di Parigi », 15-04-1958.

²⁷ HAEC, BAC 089, 1983 (11), Lettre de M. Walter Hill, Secrétaire Général de la CCI au Président du Conseil de la CEE, M.V.Larock, 02-07-1958; Résolution du Conseil de la CCI, Les pratiques commerciales restrictives et le Traité de Rome, 06/07-05-1958.

This position was a clear invitation to the new Hallstein Commission and to the new Commissioner for Competition, Hans von der Groeben, for rapid action. This position had not been an easy one to adopt within the ICC. The delegations from the USA, UK and Germany would have preferred not to take the risk of provoking with this position an acceleration of the timing in the issuing of the regulation (whose initiative was within the hands of the Council for a period of three years, before passing into a Commission initiative, if nothing had been made within this period). Moreover, it was feared that a rushed debate would only deepen the blocking of positions in the Council regarding the most controversial aspects introduced in the Treaty.

In contrast, the delegation most favourable to a quick and direct public response to the position of the ICC was the French, headed by René Arnaud, General Secretary of the Conseil des fédérations industrielles d'Europe (CIFE), which included the representatives of national industrial federations of the OEEC member states. (Rollings & Kipping, 2004).²⁸ The reason was surely very similar to that argued by Jean Louis, President of the French CNPF section for European affairs, and Robert Fabre, from its international commission, namely that it was necessary to quickly restore the general validity of cartels as a means to permit European, and French, firms to adapt themselves to the elimination of trade barriers. Both men shared the conviction of Raymond Lartisien, CNPF's representative and President of the Commission for Competition rules of the federation of EEC industries, UNICE, that the accommodating French model of competition policy would impose itself as the example to follow. (Warlouzet, 2008)²⁹ It was obvious that the Benelux countries also supported the quick publication of the report, but only under the name of Sermon, and not of the ICC. In favour too of a public position of the ICC was the Italian delegation, whose commission for competition matters was within the hands of Fiat through its young owner, Gianni Agnelli, and Fiat's economists and business lawyers, particularly Fiat's top economist Carlo Bussi and the lawyers Vittorino Chiusano, and Professor Eugenio Minoli from the University of Modena. In their view a mid-way solution was that the ICC presented the same conclusions of the report but with a less aggressive tone than that adopted by Sermon in his paper.³⁰

The final decision adopted by the ICC council to issue this resolution showed that the EEC countries imposed their view, despite the reluctance of Italian and Belgium quarters that lacking a national legislation for competition, their national governments could start using the EEC Treaty as soon as possible. Maybe pushed by a stronger sense of urgency than in the countries already with legislation, Fiat instructed Professor Minoli to take up Sermon's call with a policy paper to be submitted to the European Commission about the shape of the forthcoming regulation. Emanating from the Italian section of the ICC, the Minoli paper, which the Confindustria did not approve, had two objectives: on the one hand, it subordinated the illegality of a cartel to the effective existence of damage to trade between EEC countries, by focusing on the finding of damage, and not the moment when the cartel had been agreed. This subtlety served to block the retroactive application of the law. On the other hand, Minoli suggested that the regulation create a supranational administrative authority with the power of enquiry, but also of legal initiative, together with a panel whose members would be economic and legal experts independent from administrative pressures, who would decide on the compatibility of the cartels with the Treaty.³¹ The idea of an independent anti-trust authority following the American or German model seemed to be the clear design for Fiat and

²⁸ Rollings, N., Kipping, M. (2004), "Networks of Peak Industrial Federations: the Council of Directors of European Industrial Federations and the Council of European Industrial Federations" in M.Dumoulin, *Economic networks and European integration* (Bruxelles, 2004), pp.277-300.

²⁹ AN, 72 AS (CNPF Archives in the Roubaix Centre for French business archives), 1388, Note de Lartisien pour MM.Villiers, Louis, Hommey, de Soultrait, Robert Fabre, 27-10-1960 ; Jean Louis' articles in the 1958 issues of *Bulletin du CNPF*; R.Fabre, "Les pratiques commerciales restrictives et le Traité du Marché commun", *Revue du Marché Commun*, 1958-5, pp.260-268, quoted in Warlouzet, op.cit., p.182.

³⁰ ASF, Statistica, 36/2219, Chambre de Commerce internationale, Commissione internazionale delle intese, « Riunione di Parigi », 15-04-1958.

³¹ ASF, Statistica 38/2325, CCI, Commissione Intense, 02-12-1958.

the large Italian multinationals within the Italian section of the ICC. Summing up, in the view of the largest European multinationals, there was already some leeway to shape the definitive form of the implementation of the Treaty of Rome.

The Commission quickly answered the ICC request for clarification because this demand also came from the UK, who wanted to know the way this would affect its companies, and Germany, where a real polemic was taken place as the German law started to become operational in 1958. Directed by commissioner von der Groeben, DG IV enquired how to start a coordination of member states application of the rules to avoid a different application of the articles in different cases, and requested that the states without legislation, like Italy, could quickly approve a system which could help them to pursue cartels and monopolies according to the new legislation.³² In its first general report, and in a speech delivered in October 1958 by President Hallstein, the Commission stressed that article 88 of the Treaty made clear that the principles of competition were valid from the first day, and that national governments were supposed to apply them as if they were their own laws. Such a principle was stressed by the director-general for industry, the Dutch Pieter Verloren Van Themaat, insisting that they were compulsory obligations for member states and not just general principles. The Commission saw its role as a coordinator of all national systems because it became very clear from the member states that the regulation would have to wait for at least the three years forecasted by the Treaty.

For Fiat, the position of the European Commission only served to accelerate the introduction of a “restrictive and demagogic” Italian competition bill. The strategy that the Italian multinational followed to prevent such a perspective was to keep using the ICC to put pressure on the governments of Belgium and Luxemburg to pass their laws earlier and become the reference for a future Italian law. It also searched to make of the ICC an official and privileged partner of the Commission (as it was for the United Nations).³³ This last strategy was successful as in early 1961 Commissioner von der Groeben and Director-General Van Themaat, met the ICC commission for cartels, headed by the French President of Pechiney, Raoul de Vitry d’Avaucourt, Lucien Sermon, Eugenio Minoli, René Arnaud, and the legal advisers of Philips, AEG, Imperial Chemical, and also an American business lawyer, George Nebolsine from Coudert Brothers. On that occasion, they supported the Fiat proposal to appoint a “Federal Trade Commission without decision-making power”, which would act as a consultative independent committee similar to a court and made up of judges and other economic and legal experts. Minoli added that it would not take power out of the Commission which would decide in the last instance and not affect the member states with an already existing legislation. For the ICC the ideal model would be the creation of a specialised Anti-trust Court.³⁴

An additional reason for Fiat to search for this different channel of influence was that there was an open conflict with Confindustria in the strategy to follow in this concern, given that like all the other national trade associations from EEC countries within UNICE, the Italian confederation aimed to delay, and not accelerate like Fiat, the development of the Treaty in competition matters, on the basis that the European Commission would become trapped with practical and legal difficulties. According to the CNPF, the three year period would serve to demonstrate the utility of cartels. This strategy was even followed by the German BDI which had unsuccessfully opposed a very strict German anti-cartel law. For this reason they supported the attempt of French industry to make the more accommodating French cartel law the model for the future regulation of the EEC. UNICE put all

³² HAEC, BAC 001, 1971 (79), Direction générale de la Concurrence, Note confidentiel pour la Commission sur les premières questions à trancher en vue de l’application des articles 85 à 89 du Traité, 14-07-1958.

³³ ASF, Statistica, 39/2364, CCI, Sezione Italiana, 03-02-1959.

³⁴ HAEC/BAC 089/1983/11. CEE, Commission, DG Concurrence, Compte rendu succinct de la réunion tenue le 13 mars 1961 avec le groupe “Pratiques restrictives et intégration européenne” de la CCI, 28-03-1961.

its hopes on Marjolin and the French government (whose Minister of Industry Jeanneney had already asked Prime Minister Debré to oppose making the Commission responsible for this policy), being able to block von der Groeben's attempt to impose on the EEC the German model that his master, Ludwig Erhard, had just imposed on German industry.³⁵

In sum, business representatives took different positions towards the future EEC regulation on competition. Whereas the ICC led by Fiat and Brufina still aimed to exclude the nation-states from the future governance of the system, UNICE and its national federations pinned all their hopes on action by the nation-states to block the Ordo-liberal attempt from the European Commission to introduce the restrictive German legislation on an EU-wide scale. At the end of the day, UNICE was right because the regulation was only presented by the European Commission after the three years scheduled by the Treaty, ie. after it no longer had to achieve unanimity in the Council to pass this regulation. The question was obviously put on the table after one year during the last days of 1961 by Germany, whose strict legislation disadvantaged its firms in relationship to the rest of Europe. It was precisely during the famous "marathon" negotiations to enter into the second stage of the Common Market through the approval of the Common Agricultural Policy (CAP) scheme submitted by the Commission, that Germany made adoption of the Regulation on competition an absolute condition for accepting a CAP requested by France and the Netherlands.³⁶ The regulation had already been under discussion for several months and, according to the Renault's manager for external affairs, Lorenceau: "to a large extent, it gave satisfaction to German thesis".³⁷ Was this really the case?

Analysis of Regulation 17/1962 does not fully confirm this point. It is true that in his note about the regulation, the Renault manager pointed out that its main feature was that the companies were constrained to declare all the cartels in which they were involved, excepting those which did not affect import or export between EEC member states, before the date of August 1962. This notification system was one of the three major points of disagreement in the Council debates, the other two having been the creation of a consultative committee, and the juridical nature of the exceptions which permitted a cartel. For the French, this was an error because, for administrative reasons, it was impossible to put into practice given the important numbers of agreements which had to be notified (especially as companies had no means of knowing beforehand if they would be accepted or not). This fear turned to be justified, because there was an accumulation of cases without resolution, discrediting DG IV.

The second element of the supposed German victory was that the institution in charge of competition policy was exclusively the European Commission, something which could not be considered a surprise given that also in the managing of the CAP the Commission had won such a battle. There was not much that France could do to stop the Commission from this exclusivity as already in the negotiations the other EEC countries were already in favour of giving decisional powers to the European Commission. However, the French request for a role of the Council had not entirely been left out of the regulation, because its article 10 created a Consultative Committee whose consultation was compulsory for the European Commission. This Committee was very different from the one suggested by the Economic and Social Committee (which excluded civil servants from the member states and gave priority to qualified economic and legal experts chosen among the organisations represented within the Social and Economic Committee, including representatives of consumers organisation). This was the furthest that the suggestions of large European multinationals got, because in the Consultative Committee actually created by the Regulation, its members only

³⁵ AN 72 AS 1388, Réunion de la commission des règles de concurrence UNICE, 15-04-1958, quoted in L.Warlouzet, *op.cit.*, p.190.

³⁶ Ministère des Affaires Etrangères de la France, Représentation Permanente, RPUE 1143, Note de François-Xavier Ortoli, secrétaire générale du SGCI, 17-11-1961, cité en L.Warlouzet, *op.cit.*, p.192.

³⁷ AR, V-P, Relations Exterieures, note 526, 15-01-1962.

represented the member states. Subsequently their role was to be of importance because they had to be informed in detail in all cases (producing minutes of their discussion before any decision was taken in this field, but whose opinions were not made public).

The importance of this Committee is that whenever a case would arrive before the College of the Commissioners, each of them would already know very well the view of their own member state and the reasons for it. Moreover, if the regulation established the Commission's monopoly for the application of exceptions to cartels, it did not do so in relationship to the general control of cartels, leaving national authorities the possibility to do so, even if it was not clear whether they were obliged to, a fundamental issue for countries without legislation like Italy. In this concern, the European Commission was a step backwards in supranationality in relationship to the ECSC where there was no place for enforcement activities by national competition authorities or national courts. France had also obtained in the negotiations two further concessions: the possibility of the Commission to carry out sectoral enquiries when dealing with anti-cartel behaviour; and the notification of exclusivity agreements.

In conclusion, with Regulation 17/62 representatives of Germany certainly obtained the victory of not having at the European level a much less strict system than the one that they had approved at home. Moreover, they allowed German competition policy to preserve its specificity towards domestic cartels and monopolies. Indeed, however, it was this fear of disadvantaging German enterprises in international competition, rather than just the ideological faith of Ordo-liberals, which brought Adenauer's Germany to accept to barter their financial support for the Common Agricultural Policy in exchange for the approval of Regulation 17/62. In so doing they enabled German ordo-liberals to catch the train that they missed in the Spaak report and the Treaty of Rome. But this was also because the ordo-liberal project for European competition law was one which would give control to an independent administrative authority as in Germany. Finally, as we set out below, it was one thing to have fought to introduce a certain system of rules for competition, and a very different issue to actually succeed in using it to reduce existing, and forthcoming, cartels and monopolies.³⁸

2.4 The beginnings of policy failure: 1963-69

By 1963 the DG IV had received more than 900 notifications of multilateral agreements and 34,500 bilateral agreements, most of which were vertical agreements, like those of the automobile industry. This sector alone notified 500 agreements with dealers within the six countries of the EEC. As the French had forecasted, it soon appeared that the kingdom of von der Groeben, was administratively unable to handle one by one all the notified cases. In spite of the increasing pressure of all member states, including Ordo-liberal Germany, the Commission took long delays to issue decisions which could serve to enlighten EEC firms about how to draft their collaboration agreements without fearing of being outlawed and fined at a later stage. The situation was increasingly tough for DG IV which argued that it could not take any decision of principle without having evaluated the thousand of agreements which it had received (Warlouzet, 2008)

In 1964, the situation had not yet been solved and the situation was graphically described by the French permanent representative, Jean-Marc Boegner, as a paralysis of DG IV *"from down to top of the hierarchy.(...) at the level of directors inefficiency is pervasive(...) the Commissioner and his cabinet do not trust their services and they doubt to introduce badly finalised cases to the juridical*

³⁸ For a slightly different conclusion see Warlouzet (2008). Even when he emphasizes, contrary to our viewpoint, the impact of ordoliberal doctrine on policy, he acknowledges that this was also possible as a result of the concessions made by Germany over the CAP during the passage to the second stage of European integration. Furthermore, he agrees that ordoliberals did not obtain everything they idealized, namely, the integral transfer of their system to the European level, and their total failure to implement it.

service, and even less to the College of Commissioners.(...)The Commission appears reluctant to meet the member states, as a proof of its embarrassment".³⁹ It was only in September of 1964 that DG IV issued its first decision to forbid a cartel from a vertical agreement, the famous Grundig-Costen case, whose confirmation by the European Court of Justice took place nearly two years later, in 1966.

Simultaneously, von der Groeben convinced the Council to issue Regulation 19/65, which gave the Commission the discretionary power to decide on block exemptions only for exclusive dealing and licensing agreements. This regulation passed with great difficulties because the Italian government, which had unsuccessfully opposed the granting of block exemption powers, in 1965 appealed this majority decision to the Court of Justice with the hope of having the Regulation cancelled on the basis that article 85 could not be applied to vertical agreements like those of automobile distribution.

Again, it was the Court of Justice the responsible of the rescue of DG IV, but the application of the block exemption had still to wait until this decision had confirmed the Council authorisation. It was again, only with the Council authorisation, that DG IV managed to pass regulation 67/67 about block exemptions for exclusive distribution and purchasing regulation(Swann, 1978). That same year, when the patient, long march towards an Ordo-liberal competition policy was about to take shape, von der Groeben was taken away from DG IV, to take responsibility for Internal Market and Regional Policy, substituted by the Dutch M.J.A.Sassen. The only hope to continue this policy was that von der Groeben's head of cabinet, Albrecht, was simultaneously appointed director general, substituting the Dutch Social democrat Verloren Van Themaat.

In sum, a decade passed by from the signature of the Treaty of Rome until the moment in which DG IV could actually start using its anti-cartel powers vis-à-vis European companies with some confidence, but always seriously curtailed by the Council and protected by the Court of Justice. Meanwhile DG IV was fighting for having the powers for its ambitions, the backlog of notified cases in important industrial sectors like the automobile industry remained in a legal limbo for many years. For example, the first automobile distribution agreements were not authorised until March 1972, when DG IV issued its first decision on a case of automobile distribution involving BMW Germany, an agreement notified in 1963.⁴⁰ Indeed, one thing was to preach the ordoliberal credo and other to act according to it and having in impact on real existing cartels and monopolies.

Summing up, if the articles on competition of the Treaty of Rome were a victory for neo-mercantilist French conceptions on competition, German ordoliberals balanced this partial defeat with a relative success in Regulation 17/62. However, the latter turned out to be largely ineffective due not only to the lack of administrative capacity of ordoliberals to implement it, but also to the political guerrilla warfare carried out by their neo-mercantilist opponents in France and Italy to block other important draft Regulations in competition law that would have given more content and powers to the ordoliberals.

Indeed, a vivid illustration of the difficulties of ordoliberals to claim victory over competition policy are the words written in 1969, and presumably in optimistic terms, by the first of all ordoliberals, the President of the European Commission Walter Hallstein. For him, competition policy *"was growing slowly and steadily, like a tree.(...) Admittedly, it took a good deal of time to get thins moving. Regulation n° 17 came into force only after four years of arguments and debate, in 1962. (...) It was not until 1965 that the Commission was empowered to exempt certain types of engagements*

³⁹ Idem.

⁴⁰ It is only in 1983 that the Commission drafted the first detailed Regulation 123/85 for the block exemption for motor vehicle distribution and servicing agreement replaced ten years later by Regulation 1475/95, which had a duration of seven years until the 30th September 2002.

*in restraint of competition from the general prohibition against cartels, and it was not until 1967 that the Commission could eventually use that power. (...) While the decisions of the Commission and the European Court of Justice in interpreting article 85 of the Treaty of Rome are gradually giving effect to the provisions it embodies, the application of article 86 is presenting the Commission with considerable difficulties.”*⁴¹

This optimistic statement can also be seen as a confession by Hallstein of the fundamental incapacity of the Commission he directed for nearly a decade to make EC competition policy ordoliberal. Although some important developments were to take place in this direction during the 1970s, the overall trend was, on the contrary, still in favour of neo-mercantilist economic doctrine and its defenders within large firms, national governments and even the European Commission (Ramirez-Perez & Smith, 2009). It was only from the mid-1980s that change began to take place which, albeit temporarily, allowed ordoliberals to gain more influence.

3. Full Institutionalization of EC Competition Policy (1985-92): An ordoliberal/Chicago School Alliance begins to take charge

Indeed, in the space of seven to eight years at the end of the 1980s and the early 1990s, the EC's competition policy was transformed from a relatively weak set of instruments largely overshadowed by neo-mercantilist approaches to sectorized industrial intervention into a tightly knit policy placed at the heart of a revitalized neoliberal economic doctrine made and implemented not only 'in Brussels' but also throughout the member states. Many analyses of this radical change highlight a combination of two arguments. First, the single market programme and Single European Act (SEA) is seen as providing the touchstone for the relaunch of competition policy (Cohen & Lorenzi, 2000). Second, the rise of neo-liberalism in several key member states had also reached the Commission by the late 1980s (Hooghe, 2001). In short the activation of an EU government of competition policy is often explained as simply the result of intergovernmental consensus over the need to reinvigorate the EU's economy by not only completing the single market but also injecting neo-liberal doctrine into this process.

Apart from being fundamentally over-general, this argument possesses a number of specific and deeper flaws. First, the SEA contained nothing actually on competition policy (Armstrong and Bulmer, 1998: 93). Rather its prime focus was upon the removal of a whole range of barriers to intra-Community trade. Second, neo-liberalism is a very 'broad church' and evocations of the market were made by actors from many different political party and ideological backgrounds (Jabko, 2006). Moreover, as we have seen in Parts 1 and 2, many neoliberals disagreed strongly amongst themselves about the principles and operationalization of competition policy.

Instead, in such order to grasp the radical change in the status and impact of a European-wide competition policy, the hypothesis developed here is centred upon the political work undertaken by a range of actors in order to transform latent resources in the single market programme into actual change of competition policy. More precisely, the claim set out and partly tested here is that during the first two Delors Presidencies:

- ordoliberals within DG IV joined forces with actors closer to the Chicago School (notably the commissioners Peter Sutherland and Leon Brittan and their respective cabinets), thus creating a neo-liberal alliance in order to defeat neo-mercantilist theorists and actors within and without the Commission;

⁴¹ (Hallstein, 1972, 1969 in the original German version); 110-124.

- this alliance was founded upon a *reproblematization* of the single market project around competition policy and the *politicization* of issues concerning inter-firm competition. More precisely, in so doing a number of ‘technical’, mostly legal, reasons were provided by ordoliberal civil servants in DG IV – in particular by underlining that protecting competition was a fundamental treaty obligation linked to free movement rules and market integration goals (Schweitzer, 2007: 39-40). But change in the problematization of EU competition policy was only institutionalized following work that *politicized* it using value-based argumentation and publicization. Here the key actors were commissioners Sutherland and Brittan.

Overall our argument is that the key to the neo-liberal alliance’s victory over neo-mercantilism was the fusion of the technical and the political realised by a key set actors within the Commission and their mobilization of their respective networks beyond its walls (Joana & Smith, 2002). The remainder of this section illustrates this thesis first through the case of merger control, then around the issue of sectoral liberalization.

3.1 Merger Control: a clear defeat for neo-mercantilism

One of the most controversial areas of competition policy is the control of mergers. This was particularly so in the mid to late 1980s when the SEA fuelled a ‘boom’ in merger activity as firms sought to anticipate and adapt to the completion of the single market. In order to govern large mergers affecting firms in two or more member states, since 1973 the Commission had regularly been proposing a Regulation on this issue but their proposals always got blocked by ‘sovereignist’ and neo-mercantilist opponents in the Council⁴². In legal terms, the adoption of this Regulation in 1989 thus constituted a watershed because it both transferred power to the Commission and provided it with an instrument for outlawing industrial policy to create ‘European champions’. However, in order to fully grasp the change in competition policy this Regulation heralded, one needs to closely examine the political work that both made this legislation possible and then transformed its doctrinal and operational content into an institutionalized practice of EU government.

The first stage of this process of argumenting and alliance-building featured an initial attempt to reproblematize merger control as a positive change for the ‘environment’ of Europe’s key firms. Much of this work took place within and around an elite group of European company directors set up by the Commission in the early 1980s: the European Roundtable of Industrialists (ERT). Although this forum is generally perceived within social science as one dominated both by attempts to make European sectoral policies and the leadership of the Commissioner for Industry -Etienne Davignon- (Van Laer, 2007), it is important to recognise that representatives of DG IV also participated in the ERT and sought to influence proceedings (Van Apeldoorn, 2002). Indeed, not only did ‘their’ commissioner from 1981 to 1984 Frans Andriessen invest in the ERT (Cini & McGowan, 2009: 31), but his successor, Peter Sutherland used this platform to urge the ERT to become: *‘a strong supporter of EC merger regulation, perceiving it as an instrument that could be used to ease cross-border restructuring (...) it was only after a number of meetings between Commissioner Sutherland and ERT members that the latter became persuaded that EC regulation of big mergers would constitute an attractive alternative to regulation in several jurisdictions’* (Buch-Hansen, 2007: 7). According to Buch-Hansen, this work of argumentation in favour of the EU government of competition also entailed the building of alliances between Commission staff and the European employers association (UNICE), together with other important actors such as the American Chamber of Commerce and the CEFIC. This political work was also extended into a number of member states who began to reform their own competition decision-making bodies during this period⁴³. In France, for example, in 1986 *La*

⁴² A draft regulation was put before the Council in 1973, 1982, 1984 and 1986 (Wigger, 2008: 203-4).

⁴³ It is also important to take into account the action of national governments at this time in order to grasp how calls for EU intervention took hold. Beginning in the UK and then spreading throughout the Community, the liberalization of national economies in general, and the

Commission de la Concurrence was transformed into a decision-making body: *Le Conseil de la Concurrence*⁴⁴.

In 1987 this progressively ongoing political work suddenly took strength and focus from a second and unpredictable source of the 'naturalization' of the EC government of competition: The European Court of Justice (ECJ). When reviewing a Commission decision concerning the merger between Philip Morris and Rothmans, the court ruled for the first time that Article 85 of the Treaty of Rome on restrictive agreements and cartels could apply if a merger that caused a concentration of market dominance resulted from agreements by the two companies. In the short term, this judgement thus '*opened up Article 86's applicability to regulating merger control*' (Armstrong & Bulmer, 1998: 95). But from a wider perspective, the ECJ's decision highlighted that the EC did not possess an institutionalized means of regulating company mergers. Indeed, as Armstrong and Bulmer underline, this '*resultant corporate uncertainty*' came to be '*a dynamic instability that could only be overcome by agreement to purpose built arrangements*' by the Member states (1998: 95).

Indeed, if the ECJ's ruling created uncertainty for many actors, it was simultaneously perceived by proponents of the EU government of competition as providing a legal and political opportunity that they could cash in on. This third stage of the institutionalization of EU merger policy is inextricably linked with two steps in the political work carried out by the next commissioner for competition –Leon Brittan- his cabinet and officials from DG IV.

Step one of this work was of course centred upon getting the draft merger Regulation adopted by the Council. If today's competition commissioner generally has few formalized dealings with representatives of the member states through the Council, this was definitely not the case during Brittan's mandate. Adopting the mergers Regulation within this body entailed intense debates over the general economic doctrine behind this legislation, in particular whether its aim was to favour the emergence of 'European Champions' (a neo-mercantilist framing favoured by the French government) or 'to encourage competition between firms regardless of their size' (Brittan's Chicago School influenced framing and that other governments, in particular that of the UK). Just as importantly, however, this negotiation also entailed more specific points of economic doctrine regarding competition policy itself. Here on the one hand Brittan and his allies sought to technicize clauses of the Regulation that would provide rules for the implementation of competition law (such as thresholds for EC intervention and on how geographical concentrations should be calculated). On the other hand, however, this alliance also recognized the political dimension of such clauses⁴⁵. Overall, through a combination of legal and politicized argument it fought off the attempted counter-attack made during the Council negotiations by their neo-mercantilist opponents (Joana & Smith, 2002: 127-128).

Once adopted, the 1989 merger Regulation (8064/89) led immediately to the creation of a Mergers task force with additional personnel within DG Competition and, more generally, to an increased number of decisions on mergers and acquisitions, many of which were highly controversial. Indeed, it was largely through the making of Commission decisions on specific merger cases that the EU's government of mergers became fully institutionalized. Indeed, this is where step 2 of the Brittan alliance's strategy occurred, a process around which a great deal of intra and extra-Commission political work was undertaken.

privatisation of public companies in particular, was an important source of merger and acquisition activity, much of which entailed actors from different countries.

⁴⁴ Now staffed by a permanent Council and professionalized staff, as of 1989 the *Conseil de la Concurrence* began to make a series of decisions, and thus its own jurisprudence, against restrictive practices and oligopolistic firm behaviour (Dumez & Jeunemaître, 1991; Smith, 2009).

⁴⁵ As Simon Bulmer underlines, 'the threshold decisions were by no means the product of a debate aimed at rational identification of the best definition of a 'European' merger' (1994: 436).

In the making and taking of decisions on competition cases such as merger authorizations, the commissioner whose portfolio includes inter-firm competition obviously possesses a number of resources that his or her homologues do not. In particular, they have direct access to the services of DG IV and thus to technical expertise. However, one must not forget that if the college votes on a decision then each commissioner is formally an equal. Consequently, competition commissioners must anticipate such a vote and either work to avoid it, or ensure that if there is a vote that they themselves have created a sufficiently powerful coalition (Joana & Smith, 2002). Such alliance building is no easy achievement given that each commissioner may well be simultaneously under pressure from their respective member state and the clientele of their own portfolios. From this perspective, Brittan and his team set out to innovate in their treatment of controversial mergers and acquisition cases by building alliances against neo-mercantilist and/or 'national interest' driven actors who sought to dilute the 1989 Regulation through pressurizing the college during its implementation. In order to do so, throughout 1990 and most of 1991 Brittan's team sought out a case that would allow them to test the new mergers regulation. This they found in the shape of the proposed takeover of the light aircraft manufacturer De Havilland by Aérospatiale and Alenia (ATR). Despite much publicized interventions by French and Italian ministers, Brittan managed to win a debate in the College that was both highly political (over whether a strict application of competition policy was consubstantial with the completion of the single market) and highly technical (in particular through defining 'relevant markets' and 'abuse of dominant position') (Dumez & Jeunemaître, 1992; Joana & Smith, 2002: 127-9). Indeed, the Commission's ruling was strongly driven by an economic doctrine that bore the imprint of ordoliberals because it essentially argued that the domination of the market in question would be an 'exclusionary abuse', rather than demonstrating that this abuse would be 'exploitative'⁴⁶. But it was also clearly influenced by the doctrine, discourse and rhetoric which Brittan and his cabinet injected into this debate. Of course, this DeHavilland-ATR decision did not automatically confirm that Brittan and his allies would automatically dominate the college over such decisions thereafter. However, it certainly created a powerful precedent which facilitated their political work over mergers from then on.

3.2 Sectoral Liberalization: The Neo-Mercantilists fight back but lose ground

If merger authorizations constituted one front upon which the Brittan-DG IV led alliance sought to make progress against their neo-mercantilist opponents, a second important and wider area of conflict concerned the EC's regulation of specific industries. In the 1970s and early 1980s, neo-mercantilism was of course most visible in the 'industrial patriotism' practised by national governments such as that of France in the case of steel (Hayward, 1986). However, as the historian Van Laer underlines (2007), it is important to also recall and underline how at that time a form of European neo-mercantilism was also influencing thinking within the Commission, particularly within DGs III (Internal Market and Industrial Affairs) and XIII (Information technology)⁴⁷. In this regard, proponents of neoliberal economic doctrine clearly had considerable political work to accomplish in order to counter the strength of neo-mercantilist doctrines and their impact upon Commission policy proposals. Indeed, during Brittan's time in office it would be an exaggeration to conclude that the alliance he headed totally defeated their opponents by transforming economic doctrine within the Commission. Nevertheless, as the following two examples illustrate, during the period 1989-92 the opposition between neo-mercantilism and neo-liberalism became more overt and, in general terms, began to strongly favour the challenger.

⁴⁶ The Commission's decision was based largely upon simply adding De Havilland's current market share to that of ATR. The proposed merger was thereby predicted to lead to a 50% share of the world market and 67% of the European one. Although some qualitative points were also made about the likely effect upon consumers, no forecasting of prices was undertaken (Dumez & Jeunemaître, 1992: 111).

⁴⁷ Indeed, Van Laer goes as far as to consider that in the mid-1980s representatives of the Commission were 'mostly interventionist' (2007: 22).

The first illustration of this battle over the Commission's trans-industry approach to sectoral regulation occurred mainly in 1990 around a Communication that came to be entitled *Industrial Policy in an Open and Competitive Environment. Guidelines for a Community Approach*⁴⁸. Two decades on this text can appear anecdotal, but at the time it was an artefact around which proponents of different economic doctrines within the Commission clashed directly. As Ross relates in fascinating detail (1993), President Delors was actively involved in this debate through arguing that the Single Market had to become more an 'organized space' within which 'post-dirigiste' industrial policy could be applied (Ross, 1993: 21). Brittan, his cabinet and officials from DG IV provided the polar opposite to this position by arguing against any form of EU intervention that would threaten the effects of market forces and competition policy. Meanwhile other commissioners –particularly Martin Bangemann and his officials from DG III– lined themselves up in different parts of a middle ground. Finally, 'a compromise text' was approved which, overall gave more power to the Brittan alliance because it 'reinforced the idea of competition policy in general but allowed several sectoral exceptions' (Van Laer, 2007: 46).

Occurring just after the approval of this Communication, the second illustration of political work conducted by 'the Brittans' concerned one such sector: electronics. Since at least the 1960s and 70s, DG IV had strongly tended to grant this 'strategic industry' *de facto* exceptional status. For example, in 1983 the Commission authorized a merger between Grundig and Thomson (Van Laer, 2007: 31). However, the beginning of a change in approach was taken in 1988 when Commissioner Sutherland and DG IV successfully decided to use Article 90 to open up the European market for telecommunications terminals (Van Laer, 2007:46). By the autumn of 1990, however, calls for treating electronics as 'strategic' once more through reactivating EC and national public intervention (state aids and increased tariffs) became vociferous as a range of European companies⁴⁹ invoked a crisis prompted largely by Japanese imports. Within the Commission, Delors and his cabinet again sought new means to redynamize what they saw as a key part of Europe's industry (Ross, 1993). Officials from DG XIII were charged with producing the first draft of a new Commission Communication. However, this draft drew heavy criticism from many commissioners, and in particular a politicized counter-attack by Leon Brittan⁵⁰. Indeed, throughout debate over succeeding drafts of this text, Brittan's cabinet strongly opposed what they saw as the reintroduction of neo-mercantilism using both technical/legal and politicized arguments⁵¹. Ultimately, however, lacking sectoral economic data and knowledge, partisans of neo-liberal doctrine were unable to forge an intra-college alliance capable of blocking proponents of sectoral intervention and, thus, publication of a Communication on the electronics industry that left the door open to public intervention⁵².

Despite such industry-specific setbacks, overall the political work undertaken to fully institutionalize a European competition policy undertaken by Brittan's team led to a change of relationship between DG VI and the rest of the Commission's administrative services. Several other DGs were concerned here, in particular Industry and those dealing with individual sectors, but also the Commission's Legal Service (Cini & McGowan, 2009). Not only did members of Brittan's cabinet frequently intervene in inter-cabinet meetings to ensure that the Commission no longer 'sidled into industrial policy' (Ross, 1993), but upstream of these encounters they encouraged officials from DG IV to work within inter-service meetings to ensure that competition policy was respected throughout this administration. In so doing, DG IV became an organization that was both internally tight and

⁴⁸ Com (90)556 final, 16th November, 1990.

⁴⁹ Namely Olivetti, Bull, Thomson, Philipps and Siemens.

⁵⁰ Speech to the College of Europe, 29th January, 1991.

⁵¹ A sociologist who observed these clashes first hand recounts that Brittan's cabinet representative, Katherine Day, openly said in a final inter-cabinet meeting that a particular clause was 'on the left. Sir Leon will not allow the Commission to get involved in sectoral industrial policy' (Ross, 1993: 35).

⁵² *The Community's Electronics and Informatics Industry*, communication, spring 1991.

externally feared. From this base they worked to transform their problematization of competition policy into ‘the conventional wisdom’ of the Commission⁵³.

Of course, the political work undertaken by Brittan and the neoliberal alliance he headed also targeted a wider audience of interested parties and commentators. A great deal of speech-making was made to representatives of business associations, large firms and national administrations⁵⁴. Through, extolling the virtues of competition and criticizing interventionism with titles such as ‘A Bonfire of Subsidies’⁵⁵, Brittan sought ‘to be taken seriously both intellectually and politically’⁵⁶. Indeed, beyond public speech-making, Brittan was also the spearhead of a campaign of public communication which used influential newspapers, in particular *The Financial Times*, in order to present its arguments and thereby seek to create new allies throughout the EC and beyond (Joana & Smith, 2002: part III).

In summary, this section has sought to set out how and why by 1992 EU competition policy had finally become institutionalized. In so doing, it has begun to show how a new alliance of neo-liberal politicians and civil servants began to systematically defeat their neo-mercantilist opponents. But much research still remains to be done into at least two dimensions of this key period of change. Firstly, one needs to integrate into analysis of the changing government of the EU developments around competition policy that at the time were taking place within many national decision-making arenas. Our hypothesis here is that changes in EC rules and authority in the late 1980s were not imposed upon unreceptive national actors. On the contrary, through engendering common cognitive scripts and institutionalizing a long existing European network of actors, the premises of the institutionalization of an EC government of competition took their strength from being simultaneously ‘national’ and ‘European’.

Secondly, research needs to delve much deeper into the relationship between changes in the EU’s government of inter-firm competition on the one hand and, on the other, developments within academic and private consultancy expertise in this subject area. In particular, it needs to discover whether at this time the rise within economics of a sub-discipline of competition economics (Lyons, 2008:8) was already influencing the doctrines of politicians and civil servants, perhaps by encouraging a *rapprochement* between ordoliberals and actors influenced by the Chicago School.

4. Reinstitutionalization and the victory of Chicago (1997-2003)

Since the turn of the century EU competition policy has again undergone fundamental change and again the relationship between ordoliberals and tenants of the Chicago School have been central to this development. However, this relationship transformed during the period 1997-2003 from an alliance against neo-mercantilism to an intra-neoliberal conflict from which ‘Chicago’ economic doctrine has largely triumphed. Existing analyses of EU competition policy over this period describe policy change in detail but tend to understudy or underplay its doctrinal causality and content.

More precisely, this literature sets out clearly how an institutional order centred upon DG Competition, dominated by legal reasoning and operating through a system of *a priori* notification has largely given way to what many commentators see as a decentralized order within ‘economic’

⁵³ This was the strategy that such actors avowed during our interviews in 1999-2001.

⁵⁴ In particular through a series of speeches made at the Centre for European Policy Studies (CEPS) in Brussels. These were subsequently brought together as a book (Brittan, 1992).

⁵⁵ Speech to CEPS, Brussels, March 1989.

⁵⁶ Interview, ex-cabinet member, February 2000.

analysis and *ex post* or even private enforcement dominates⁵⁷. In so doing, three explanations for this shift are proposed:

In keeping with the Commission's official discourse on this change, firstly a functionalist and depoliticized explanation in terms of 'administrative overload' is put forward (McGowan, 2005). According to this line of analysis, in an EU of 27 member states, an *ex ante* notification and authorization system had produced a backlog of cases and delays for firms. Consequently it came to be seen as outdated and untenable. Policy change is thus euphemized as 'modernization'.

The second explanation of change prioritizes the role of an 'epistemic community' of competition policy specialists as agents of policy innovation. Building upon previous work on this 'community' (Van Waarden & Drahoš, 2002), recent research highlights the activism of certain Commission officials⁵⁸, lawyers⁵⁹ and shareholder-rights activists⁶⁰ as both demanding and proposing policy change

Finally, certain specialists of competition policy attribute change to the increased prestige and importance given to economics within DG COMP. Wilks in particular not only underlines that the two most recent competition commissioners -M. Monti and N. Kroes- are 'economists' by training and that the former was 'pivotal' in 'the turn to economics' (2007: 16). He also brings together statistics about the number of economists employed by DG COMP (Wilks, 2007: 9⁶¹).

If the functionalist explanation for 'the modernization' of the EU's government of inter-firm competition merits treating with great caution, the other two sets of actor-centred claims already appear convincing. In order to test and push them further, however, our own research will attempt to go deeper into the analysis of policy change by discovering links between it and parallel debates over the economic doctrine that different actors consider 'should' provide EU competition policy with its ideological and normative foundations. This perspective is illustrated below first through the recent change in the government of anti-trust arrangements and then through that of mergers.

4.1 The injection of 'economics' into the EU government of anti-trust

In the field of EU action against anti-trust behaviour, most academic attention has thus far been focused on describing how officials within DG Competition have proposed, then negotiated through the Council and the EP, a series of detailed legislative texts which have facilitated Commission intervention. In particular, in 2002 a 'leniency clause' was introduced which allows the Commission not to punish firms who had provided information leading to the successful identification and prosecution of cartels. This has since sparked a programme of work in the

⁵⁷ Indeed, as early as 2000 Patrice Geoffron had identified a process wherein 'without any real debate, a shift took place from a logic of regional integration to one according to which competition was promoted because of its supposed virtues in the allocation of resources' (2000: 373).

⁵⁸ According to Wigger (2008: 73), conflict within DG IV took a new turn in 2002 when Philip Lowe was imposed as its Director General. This British EU civil servant is himself quoted as characterizing DG Comp 'as ideologically divided in two camps, notably that of the 'Modernists' and that of 'Jurassic Park'. The 'dinosaurs of DG Competition, according to Lowe were those still adhering to the ordoliberal philosophy'.

⁵⁹ Wigger and Nölke claim that an enforcement system that encourages litigation coincides with the motivations of the legal profession. More exactly, they argue that representatives of both EU and non-EU (notably US) law societies and companies have worked politically towards this end: 'As regular and influential guest at the preparatory stages of the reform, they displayed their expertise in the form of lengthy advisory reports to Commission officials and pushed strongly for harmonized rules and private litigation possibilities' (2007: 504).

⁶⁰ Shareholder rights organizations, institutional investors and the financial press are also seen by Wigger and Nölke as promoters of legal reform and, in particular, the introduction of class action lawsuits in Europe which, they claim, enable shareholders to influence the behaviour of firm management in general, and their approach to mergers and takeovers in particular (2007: 505). Change in the EU's government of mergers and acquisitions is therefore analyzed as overlapping with reforms of the institutions of corporate governance in Europe which strengthen shareholders in their dealings with company managers. Indeed, Wigger highlights 'the intimate connection between competition policy and corporate governance' (Wigger, 2007: 98; van Apeldoorn & Horn, 2007; Höpner & Schäfer, 2007).

⁶¹ Wilks underlines that within DG COMP's total staff of around 700 officials, 134 are 'economists' of whom 13 hold PhDs. His primary source here is the *Global Competition Review*, 9(7), July 2006

Commission to encourage ‘whistle blowers’ within specific industries to come forward. This strategy appears to have met with considerable success because, as McGovern underlines, ‘the twelve highest fines in the history of EC cartel policy were all levied after 2000 and nine of these occurred after 2005⁶²’ (2007b: 6)⁶³. However, such ‘redescription’ of change avoids the two-sided causal question of *why* change in the underlying logic of anti-trust policy occurred during this period and *who* brought it about? A means of answering such questions is to examine when and how the actors concerned began to criticize, and more generally conduct political work to deinstitutionalize, the EU’s previous approach to antitrust.

A first step in this direction was taken between 1999 and 2002 around cases where the European Court of First Instance (CFI) not only reversed the decision of the Commission, but cited ‘insufficient economic analysis’ as its main reason for doing so⁶⁴. Lyons traces the problem here back to a change in the Commission’s market definition notice of 1997 and its ‘explicit use of economic concepts’ that DG Comp officials proved unable to deal with when preparing decisions on actual cases (2008: 15). In particular, this economist identifies ‘a big gap in Commission practice’ due to it undertaking ‘no systematic analysis of demand elasticities and cross-elasticities’ (Lyons, 2008: 25).

A second issue around which systematic criticism of previous Commission practice began to develop concerned the identification and prosecution of ‘vertical restraints’. Occasionally the Commission did successfully outlaw such restraints through building cases which relied essentially upon formalistic legal reasoning. Following repeated criticism of the Commission by the ECJ, its CFI and representatives of business in the mid-1990s that the former has too often neglected ‘the context’ of inter-firm agreements, a Green Paper on Vertical Restraints was published in 1997 which suggested that more ‘economic analysis’ on ‘relevant markets’ be undertaken in the course of Commission investigations⁶⁵.

More generally, over the years 1997-2003, the need for ‘economic analysis’ has been repeatedly invoked not only to deinstitutionalize previous practice by labelling it ‘a problem’, but also to reproblemize the Commission’s anti-trust actions as needing to be based upon ‘sound economic analysis’. More generally still, this shift was consolidated through an internal review of DG Comp undertaken in 2003 that led to a flurry of activity: the following year DG Comp took on a Chief Economist⁶⁶ and set up under his authority an *Economic Advisory Group on Competition Policy* (EAGCP)⁶⁷; this group then published a report on anti-trust action in 2005 (EAGCP, 2005)⁶⁸; finally in 2008 the DG itself published a new set of guidelines which explicitly encourages more ‘economics’ and ‘effects-based’ reasoning.

⁶² In 2007, a case of ‘Elevators and Escalators’ led to the highest fine ever of 992.3 million euros. Other key cases have involved ‘Vitamins’ (2001: 790.5 million) and Gas switchgear (2007: 750.7 million).

⁶³ Indeed, in October 2006 new and tougher guidelines regarding the calculation of these fines for infringements were issued.

⁶⁴ *Airtours vs Commission* (Case T-342/99), *Schneider Electric vs Commission* (T-310/01) and *Tetra Laval vs Commission* (T-5/02). According to Wigger (2008: 260), this criticism of lack of economic analysis also followed that made during a number of Transatlantic cases concerning Boeing, GE-Honeywell and, subsequently, Microsoft.

⁶⁵ This Green Paper was a first step towards a new Vertical Restraints Regulation (2790/1999) set to expire in 2010.

⁶⁶ The person occupying this senior post in DG Competition is supposed to provide ‘independent’ expertise and advice, particularly on methodological issues. They are also charged with assisting in the development of policy instruments and individual cases involving the courts. The first nominee to this post was Lars-Hendrick Röller (presented by Wigger as being from the ‘Chicago school’: 2007, 108). Since 2006 this post has been held by Professor Damien Neven (Professor of Economics at the Graduate Institute of International Studies in Geneva and ex- INSEAD and University of Lausanne).

⁶⁷ So far 20 economists from throughout Europe have been members of this group. We are currently undertaking sociographic analysis of its membership and their respective approaches to economic analysis.

⁶⁸ This report advocates ‘an economic approach to article 82’, ie ‘an effects based’ rather than ‘a form based’ approach (p. 2). In order to legitimate this shift, the report invokes in particular the findings of ‘a post-Chicago consensus’ within Economics, the need to make consumer protection the key yardstick, ‘competitive harm’ as a key concept, and the virtues of economic modelling. In so doing the report caricatures the ‘form based’ approach of previous ordoliberal practice and technicizes concepts of effects, efficiency as being ‘sensible’ and therefore value free.

Interestingly, the consumer is frequently invoked in order to legitimate this shift in policy⁶⁹ - an argument from Chicago-School economics that has also frequently been politicized as a means of placing 'cartels' firmly back near the top of the Commission's competition agenda. Beginning in 2000 with speechmaking by Commissioner Monti who labelled cartels as 'cancers on the open market economy'⁷⁰, then followed up by his successor Neelie Kroes, these representatives of the Commission have repeatedly underlined the need for tough action in this area and linked it to more general EU goals such as competitiveness, fairness and protection of the consumer⁷¹.

Overall then, anti-trust policy change has been achieved through a combination of constant reproblematisation using detailed technical argumentation taken mostly from Chicago-school economics⁷², but also occasional politicization using rhetoric drawn from the same source. Indeed, Wigger sees all these developments as adding up to nothing less than 'the vanishing of Ordo-liberalism in one of its last strongholds' (2007: 108). Rather than simply jump to this conclusion ourselves, careful research still needs conducting to ascertain how the shifts sketched out above have come about and who has been behind them.

4.2. A more permissive approach to mergers: from exclusionary to exploitative abuse

A highly similar shift in the Commission's treatment of mergers has also occurred since the mid 1990s. Indeed, since the late 1980s control of mergers and acquisitions on an EU scale has undergone a more or less constant process of reinstitutionalization. Following an interim amendment of the merger regulation in 1997, the Commission published first a Green then a White paper (1999) on how to reform EU policy instruments in this area. This ultimately led to a revised Merger Regulation (139/2004) which modified the timetables for processing applications in particular. However, and more importantly still, meanwhile a more general negotiation in the Council took place that actually closed earlier by producing a new Regulation (1/2003). By replacing Regulation 17/1962, the latter modifies in particular the enforcement of Articles 81 and 82 of the Treaty. Indeed, as all academic competition policy specialists underline, Regulation 1/2003 changes not only the logic of merger and takeover control, but also the roles of both the public and private actors engaged in this process.

The most publicly apparent aspect of this change is that since 2004 control has not only been conducted by the Commission (for all mergers which potentially affect trade between member states), but also by a formalized network of national competition authorities and courts (Ramirez-Perez & Smith, 2009). But just as importantly the system of prior ex ante notification control introduced in the early 1960s has been replaced by one of ex post control which deliberately enrolls the very companies whose behaviour competition policy is supposed to regulate. More precisely, since 2004 companies seeking to merge or make takeover bids no longer have to notify and await approval by the Commission. Instead, representatives of these companies must themselves assess the merger or takeover's market impact.

⁶⁹ 'First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid harm to consumers. I like aggressive competition –including by dominant companies- and I don't care if it may hurt competitors, as long as it ultimately benefits consumers'. Speech by Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82', speech delivered to the Fordham Corporate Law Institute, New York, 23rd September, 2005.

⁷⁰ Monti M., 'Fighting Cartels: Why and How?', speech to the Third Nordic Competition Policy Conference, Stockholm, 11-12 September 2000.

⁷¹ For instance, Neelie Kroes has repeatedly made speeches that contain statements of the following type: 'cartels make Europe less competitive and put the brakes on our future economic growth. Why invest, why innovate, when you can sit back and profit unfairly from an illegally engineered allocation of resources'. 'Assessment of and Perspectives for Competition Policy in Rome', speech in Barcelona, 19th November, 2007 (cited in Cini and McGowan, 2009: 63).

⁷² It should also be noted that the introduction of leniency clauses in EU legislation is a practice backed up by the post-Chicago consensus of economists who use game theory to predict firm behaviour.

Many commentators rightly see this change as a shift in 'the burden of proof' (Lehmkuhl, 2009: 106). But more analysis needs undertaking into a deeper shift in what type of economic analysis is to be used as 'proof' of an anti-competition merger. Previously this proof involved the establishment by DG COMP of 'a dominance test' (DT) based on market share. Criticized by Chicago-school economists as 'giving too much weight to market shares, and so market structure, over economic effects' (Lyons, 2008: 14), as of a Commission Green Paper in 2001, the DT has been replaced by a new standard - 'significant impediment to effective competition' (SIEC)- that is much closer to terminology used in US merger policy (Lyons, 2008: 19; Wigger, 2008: 310-11).

A second consequence of these new rules on notification and enforcement has been to encourage private arbitrations that take place either directly between firms or through a neutral mediator. Traditionally most actors within the Commission and the ECJ have been sceptical about arbitration. But this position appears to have shifted significantly to one of 'embrace': 'Today the Commission not only accepts arbitration in competition matters but also incorporates private dispute resolution in its decisions on mergers and acquisitions' (Lehmkuhl, 2009: 117).

The effects of these two significant changes to the EU's government of mergers are obviously still in the process of stabilizing and institutionalizing. For example, according to Lyons, 'the Commission has yet to clarify its attitude to highly sophisticated economic analysis, in particular to merger simulation' (2008: 51). Part of our future research will therefore be concentrated on these processes. Just as importantly, however, the causes of change merit much further reflection and study.

Indeed, to conclude provisionally on what we have discovered thus far on recent change in EU competition policy, the following three lines of questioning will need to be further developed and empirically tested.

First, although neoliberals have clearly dominated the EU's government of competition since the early 1990s, neo-mercantilists are still very active and often powerful within certain industries, such as car-making and retailing (Jullien, 2008), wherein they seek derogations from trans-industry rules. Under what conditions can and do neo-mercantilists successfully 'fight back'?

Second, amongst the makers of neo-liberal economic doctrine, proponents of Chicago or 'post-Chicago' economics have gained the upper-hand over their ordoliberal rivals. Nevertheless, as evidenced by its continuing differences from US practice, traces of ordoliberalism remain in the way inter-firm competition is governed at the scale of the EU (Schweitzer, 2007). What importance should one accord to the ordoliberal institutions that remain and who are the actors that continue to defend them?

Finally, research on EU competition policy needs to be extended outside the Commission itself to uncover a wider range of political work that, when understood cumulatively, has caused change in this mode of government. National competition agencies are obvious objects of study here. But one also needs to include representatives of certain firms (or types of firm) and the effects of a general rise in the existence and political usage of economic consultancies since the late 1980s (Lyons: 2008).

Conclusion

More generally, this paper has sought to begin setting out a coherent programme of new research based upon a theory-driven revisiting of the whole history of EU competition policy. Our approach to this revisit has been inspired by (historical) institutionalism, industrial economics, public policy analysis and constructivist political sociology. At this stage it would be presumptuous and risky to announce hard and fast conclusions about the added value of this approach. Instead, we want to simply underline three of the points made above which will be pursued in the remainder of our research.

First, it is highly important to analyze the content of the economic doctrine used in debates over competition policy as well as in its application. Indeed, the very production of this doctrine needs more careful analysis which pays particular attention to the mobilization of concepts and arguments from the discipline of Economics.

Second, our approach to the study of EU competition policy also highlights the importance of simultaneously studying economic doctrines and the actors that develop and carry them into decision-making arenas. Through focusing upon the political work of ‘argumenting’ and alliance-building through which this policy has been institutionalized, the causes of this process can be identified with precision. In particular the role played by certain carriers of economic doctrine, eg. ‘economic consultants’, needs better identification. Just as importantly, such an approach allows one to better understand the reproduction or change of policy instruments, and thus of EU governmentality⁷³, that this process has changed.

This point leads into a more general methodological one concerning the treatment of ‘ideas’ by social science. Our research to date has born out the need for a second generation of constructivist scholarship (Parsons, 2007) which refuses to leave analysis of change or reproduction of governmentality in the hands of ‘idealists’ who rush too quickly to conclusions about ‘the power of ideas’ without retracing precise episodes of political work and ascertaining their respective effects. Specifically, although taking the doctrine of ordoliberalism highly seriously, we see little evidence to support the idea that their approach to competition policy has had hegemonic influence over the EU’s government of inter-firm competition. Instead, over the course of the last sixty years this government has been dominated by doctrines –notably but not exclusively ordoliberalism- and their supporters that have differed considerably. By analyzing the role of such doctrines *within* political work, this paper thus sets out an agenda for a constructivist approach to the EU’s government of competition that is resolutely historical and sociological.

⁷³ On this point, our approach also leads one to develop research that could feed into actor and even public debate about economic policy. The need for more public debate over the doctrines behind the EU’s economic policies in general, and that of competition in particular, has been recognized for some time. As Geoffron concluded nearly 10 years ago, ‘Au total, il nous apparaît que la protection du processus d’intégration ne peut plus être invoquée au même degré pour défendre la primauté de la politique de la concurrence. (...) la robustesse de la dynamique d’intégration ne peut être niée. La politique de la concurrence est en fait désormais un outil au service de la croissance dont les bénéfices doivent être comparés avec d’autres outils, dont une politique industrielle européenne plus ambitieuse’ (2000: 380).

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